Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1962

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The Commonwealth of Massachusetts

BOSTON, January 15, 1963.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1962.

Respectfully submitted,

EDWARD J. McCORMACK, JR.
Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

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Head Administrative Assistant
EDWARD J. WHITE

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[1] Terminated, July 31, 1961.
[2] Terminated, August 31, 1961.
[3] Appointed, September 12, 1961.
[4] Terminated, September 30, 1961.
[5] Appointed, October 2, 1961.
[6] Appointed October 16, 1961.
[7] Terminated, December 15, 1961.
[8] Appointed, February 12, 1962.
[9] Appointed, February 13, 1962.
[10] Appointed, May 28, 1962.
[11] Appointed, June 4, 1962.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

for the Period July 1, 1961-June 30, 1962

Appropriations

Attorney General's Salary	$ 15,000.00
Administration, Personal Services and Expenses	395,319.00
Veterans' Legal Assistance	17,360.00
Claims, Damages by State Owned Cars	90,000.00
Moral Claims	10,000.00
Total	$527,679.00

Expenditures

Attorney General's Salary	$ 15,000.00
Administration, Personal Services and Expenses	392,526.17
Veterans' Legal Assistance	17,350.00
Claims, Damages by State Owned Cars	90,000.00
Moral Claims	10,000.00
Total	$524,876.17

Financial statement verified (under requirements of C. 7, S 19 GL), December 20, 1962.

By L. A. BURKE,
For the Comptroller.

Approved for publishing.

JOSEPH ALECKS,
Comptroller

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 15, 1963.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1962, totaling 21,348, are tabulated as follows:

Extradition and interstate rendition	146
Land Court petitions	157
Land damage cases arising from the taking of land:	
Department of Public Works	2,383
Metropolitan District Commission	187
Government Center Commission	41
Civil Defense	1
Department of Mental Health	1
Department of Natural Resources	18
Department of Public Safety	1
Lowell Technological Institute	2
Massachusetts Maritime Academy	5
Massachusetts Turnpike Authority	1
State Reclamation Board	2
Miscellaneous cases, including suits for the collection of money due the Commonwealth	8,678
Estates involving application of funds given to public charities	1,596
Settlement cases for support of persons in State institutions	17
Pardons:	
Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended	119
Small claims against the Commonwealth	277
Workmen's compensation cases, first reports	5,628
Cases in behalf of Division of Employment Security	649
Cases in behalf of Veterans' Division	1,439

Introduction

In accordance with the provisions of G.L. c. 30, s. 32, that the annual report of an elected state officer for the fiscal year preceding the termination of his service as such may cover the period between the end of such fiscal year and the termination of his services, this report includes material as to the activities of the various divisions of the department of the Attorney General for the period referred to, as well as for the preceding fiscal year.

Only those opinions which were rendered during the fiscal year are included in this report however.

The demands and activities of the various divisions of the department continued at the high rate of the previous period. The Criminal Division of the office appeared before the Grand Jury and obtained indictments against officials and others connected with the activities of the Massachusetts Parking Authority and the Division of Waterways, and engaged in other investigations and prosecutions.

The Division of Civil Rights and Liberties kept up the tempo of its activities for the protection of the rights of our citizens. There are set out hereafter summaries of some of the activities of the various divisions for the period covered.

Division of Civil Rights and Liberties

During the period of this report the Division of Civil Rights and Liberties was engaged in the following activities:

1. *Rights of Accused.*

Distribution of the third edition of the "If You Are Arrested" pamphlet was continued in bulk. There is a steady stream of requests for this publication.

Work was commenced with the State Commission investigating the need for revision and clarification of the Massachusetts laws and procedures relating to illegal searches and seizures. In addition, advice and instruction on this difficult question were provided to a number of law enforcement officials at their request.

Conferences and negotiations with the police of the City of Boston in respect to the establishment of a citizen's complaint review board continued. Efforts, both by legislation and persuasion, to complete the removal of cages for unbailed criminal defendants in the courts of the Commonwealth continued but without positive result.

The division participated in the investigation culminating in Grand Jury proceedings of a prisoner's death in the House of Detention located in Springfield.

2. *Equality of Opportunity.*

The division was extensively engaged in the drafting, sponsoring, and work for the passage of various measures to extend the scope and tighten the enforcement procedures of the Fair Housing Practices Law.

There was another unsuccessful attempt to outlaw the use of the word "color" on birth, marriage, and death certificates.

As in the past, the division acted as general counsel for the Massachusetts Commission Against Discrimination. In this capacity it was engaged in several cases in which the new law providing for restraining orders against the sale or rental of a dwelling involved in a discrimination complaint was invoked.

There were conferences with the Commission Against Discrimination, followed by several more with the Superintendent of Schools of the City of Boston, in respect to investigation of the problem of *de facto* segregation in the Boston School System.

The division prepared the brief and argued the case of *Massachusetts Commission Against Discrimination* v. *Colangelo, et al.*, 347 Mass. 387, the first case to reach a state high court involving the constitutionality of the Fair Housing Practices Laws as they affect private housing not publicly assisted. The Brandeis-type brief was one of the longest and most extensive ever filed by a state agency in Massachusetts litigation and attracted a considerable amount of national attention. The Supreme Judicial Court upheld the constitutionality of the law. It is generally acknowledged that this decision will have a profound effect upon a number of other cases under litigation throughout the country.

3. *Due Process in Administrative Agencies.*

A two-year project culminated in the Attorney General's Opinion seeking to furnish an administrative and statutory foundation for fairness, clarity, simplicity and uniformity in the adjudicatory hearings and regulations of the 200 agencies of government of the Commonwealth.

4. *Freedom of Speech and Assembly.*

The previous activities which had been commenced three years earlier to insure the right of peaceful demonstrations in behalf of or against divers causes such as sympathy for Southern sit-ins, a self-styled American Fuehrer, and the like, continued. During the period of this report demonstrations chiefly involved such issues of peace as the abolition of nuclear testing, the abolition of the building of fallout shelters, the conduct of civil defense drills and the like. As in the past, all peaceful demonstrations were allowed to continue unobstructed, though on occasion not without a certain amount of preliminary controversy.

The division drafted and filed an amicus curiae brief in the pending United States Supreme Court case of *Gideon* v. *Cochran*, in which it asked the court to set aside a twenty-year-old ruling that state courts need not appoint counsel for indigent defendants in non-capital cases unless "special circumstances" prevail. The Massachusetts brief based its contentions on the due process and equal protection clauses of the XIV Amendment. It stated that it was "unthinkable that in the world of today a man may be condemned to penal servitude for lack of means to supply counsel for his defense." Twenty-three states joined in the Massachusetts brief, including Minnesota, Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Missouri, Nevada, New Jersey, Ohio, North Dakota, Oregon, Rhode Island, South Dakota, Washington, West Virginia.

The interest that this brief attracted was national in scope, resulting in editorial comment from as far afield as the West Coast, the Deep South, and the Mid-West. The compilation and drafting of the brief was the culmination of four years of work of the division in its continuing attempts to provide counsel for indigent accused.

Several years of attempts to provide public hearings in Boston for citizens with complaints against the police came to a head in December, 1962, when the first such public hearing was held. Immediately a widespread controversy ensued over procedures used in the conduct of the hearings, most notable of which was the right of the aggrieved citizen to

retain counsel of his own choosing. The controversy and accompanying notoriety served to point up the substantive and procedural difficulties of insuring that the rights and liberties of both members of the public and of the police are adequately protected.

Antitrust

Antitrust activity continued to increase. Pre-trial preparation of the road material cases continued. One of the 18 defendants paid $50,000 in damages and another paid $8,000 in damages, both by out of court settlement. Negotiations for settlement were conducted with other defendants.

In February, 1962, I filed 17 separate suits in the United States District Court at Boston for triple damages against 25 electrical equipment manufacturers charged with illegally fixingp rices and rigging bids in sales to cities, towns, municipal lighting plants, the Metropolitan Transit Authority, and the Metropolitan District Commission. These cases were brought as a follow-up to the Federal Government's criminal prosecution in Philadelphia and the questionnaires returned by the cities and towns and other bodies to this office. The cases involved 7 to 10 million dollars in purchases over the past several years. The suits were filed by the Attorney General's office under the recent amendment to §10 of c. 12 of the General Laws, giving the Attorney General the authority to institute and prosecute such actions on behalf of the political subdivisions of the Commonwealth. Preliminary motions and other pre-trial matters in these cases consumed much time and manpower. Liaison in preparation of the cases was established with the Massachusetts Association of Municipal Lighting Plants and the Metropolitan Transit Authority, both large volume purchasers of the equipment.

The Department continued its cooperation with the Antitrust Division of the Department of Justice in its efforts to eliminate price-fixing and bid-rigging in sales to public bodies. The Assistant Attorneys General involved and I attended and participated in special conferences in Washington, D. C. on the electrical cases and the Annual Antitrust and Consumer Protection Conference called by the Department of Justice. In response to Executive Order No. 10936 by President Kennedy, I called a conference in December, 1961 of all state, county, and municipal purchasing officials to coordinate our activity in this field with that of the Federal Government. In addition, I have referred various other indications of antitrust violations to the Antitrust Division of the Department of Justice for its attention.

To strengthen the law against collusive bidding, I secured passage of c. 432 of the Acts of 1961 which provides criminal penalties for collusive bidding to public bodies.

Antitrust activity remained high to the end of my administration. Settlement negotiations in the road material cases resulted in the recovery of an additional $10,000 out of court. Pre-trial preparation against the remaining defendants and further settlement negotiations continued. In the electrical cases, court conferences, interrogatories, and other pre-trial matters continued. A special panel of Federal judges was established to

coordinate the pre-trial procedures and activity throughout the United States. An Assistant Attorney General attended a conference in Chicago of representatives of plaintiffs' counsel, which was called at the suggestion of this panel.

Activities in Relation to the Commonwealth's Option to Purchase the Old Colony Line of the New Haven Railroad

On May 10, 1961 the General Court passed c. 452 of Acts of 1961 creating a South Shore Transportation District which was authorized to purchase the railroad line known as the Old Colony on which the Commonwealth has held an option since 1947 and to construct thereon a rapid transit facility from Braintree to Boston. Immediately on passage of the act, two lines of actions were required of the Attorney General: the exercise of the option in the Federal District Court in New Haven and the defense of the constitutionality of c. 452 in four separate proceedings in the Supreme Judicial Court brought by the cities and towns of the area involved, and by taxpayers in those cities and towns.

1. The need for action in the Federal Court arose from the fact that earlier attempts by the Commonwealth to exercise the option had not been recognized by the District Court which had continued its existence for various periods pending further action by the Commonwealth. There were indications that the railroad's financial condition was again precarious and it was feared that an intervening bankruptcy action would cancel the option rights of the Commonwealth. Accordingly, on June 15, 1961, the Commonwealth filed a motion for Decree and Order based on the grounds that the legislation of 1961 constituted an effective execution of the option and that the railroad held the property in trust free of claims of creditors or future ties in bankruptcy. Hearings were held in New Haven on the motion on June 22, 1961.

The Commonwealth submitted a brief, prepared for the Attorney General by Special Assistant Attorneys General Paul Siskind and Nathan Paven and Assistant Attorney General Marion Fremont-Smith. On July 7, 1961, the New Haven Railroad began proceedings in bankruptcy.

On August 23, 1961 a memorandum of Decision was issued on the Commonwealth's motion which stated in part that "the court concludes that as of July 7, 1961 the Commonwealth has not exercised the option."

The Attorney General, on receipt of this decision consulted with the Governor and his Special Assistants, and it was decided to file an appeal with the Circuit Court of Appeals, which was done on September 19, 1961. For reasons which will become apparent in the remainder of this report, this appeal is still pending. Four extensions of time have been granted by the Court, the most recent of which will remain in effect until March 19, 1963.

2. Simultaneously with the action in the Federal Court, the Attorney General was called upon to represent the South Shore Transportation District and the Treasurer and Receiver General of the Commonwealth,

defendants in four suits challenging the constitutionality of c. 452 of Acts of 1961.

The first of these, filed July 3, 1961, *Town of Weymouth, et al.* v. *Driscoll, et al.* was a petition for declaratory relief under c. 231A brought by the Towns of Weymouth, Braintree and Hingham and the City of Quincy, to which the Commonwealth filed a Demurrer and Answer which was heard on July 12th 1961.

The second case, *Town of Hingham* v. *Driscoll,* was a procedure for writ of mandamus, filed July 7, 1961.

The third case, *Della Chiesa* v. *Driscoll,* filed on July 13, 1961, was a taxpayers' petition brought under c. 29, § 63 of the General Laws for declaratory relief under G. L. c. 231A. Petitioner's request for a temporary preliminary injunction was heard on July 19, 1961 at the Single Justice Session and denied by Judge Spiegel who ordered completion of pleadings. The Attorney General filed an answer, plea in abatement and demurrer.

The fourth case, *Clapp* v. *Driscoll,* filed August 11, 1961, was a petition for Writ of Mandamus filed by 1126 Citizens of the Town of Hingham. The Attorney General's Motion to Strike, Demurrer and Answer were heard before the Single Justice of the Supreme Judicial Court on August 23, 1961.

After conference with Justice Spiegel, it was agreed by the parties to all four actions that the taxpayers' case, *Della Chiesa* v. *Driscoll,* be reserved and reported to the full court for a decision on the merits of the constitutional issues raised therein, which was done on October 5, 1961.

The Assistant Attorneys General immediately undertook the research necessary for the respondent's brief. In the course of their study, they became aware of substantial and grave defects in certain sections of c. 452, not specifically under attack in the case before the Supreme Judicial Court, but essential to the operation of the statute and sufficiently substantive as to raise the possibility that the act would be void for indefiniteness.

The Attorney General immediately ruled that c. 452 of Acts of 1961 was inoperative and notified the Governor's legal staff and the Treasurer of the situation and of the advisability of advancing no further funds to the South Shore Transportation District until these matters were dealt with. A formal memorandum to the Governor was sent by the Attorney General on October 28 which outlined in detail his analysis of the statute and the actions he had taken in connection therewith. The Supreme Judicial Court was also notified of the situation and a continuance of the case was granted to May, 1962. Action was taken to postpone the filing of the appeal in the Circuit Court of Appeals for the Second District, referred to above.

The Governor's office then commenced to draft remedial legislation which was submitted to the Senate on March 5, 1962.

On May 10 the Chief Justice of the Supreme Judicial Court informed the Attorney General's Office that the Court would not hear the case on the constitutionality of c. 452 until the content of the statute in question was fixed.

The General Court in 1962 took no action on the Governor's bill correcting c. 452, nor did it pass any other legislation directly relating to the

South Shore Transportation situation. Accordingly, this case is still pending before the Supreme Judicial Court. Petitioner's brief has been filed. The brief for the Commonwealth relating only to the issues raised in the original petition is in rough draft form.

Informal conferences were held by representatives of the Attorney General and attorneys for the Trustees in Bankruptcy of the New Haven Railroad during the fall of 1962 regarding the option to purchase the railroad property. At a formal meeting in December, to which Attorney General-Elect Brooke was invited, counsel agreed to discuss with the trustees the possibility of placing the option on an inter-party basis by establishing a definite option agreement between the trustees and the Commonwealth, thus removing it from court determination and allowing the cases in the Federal District Court and the Circuit Court of Appeals to be terminated. The trustees have this matter under advisement.

Code of Ethics

Chapter 610 of the Acts of 1961 created a Code of Ethics for all government employees in the Commonwealth and in § 2 created a Special Commission to make an "investigation and study of the subject matter of this act, and all other existing laws related to conflict of interests and ethics in government, and the need, if any, of further amendments thereto or consolidation thereof."

The Attorney General was named in this statute as chairman of the Special Commission, which, in addition, consisted of ten men appointed by the Governor, five members of the Legislature, and one representative each from the Boston Bar Association and the Massachusetts Bar Association.

On August 24, 1961, I sent to each appointee a letter stating the authority and objectives of the Commission and convening it for its organizational meeting, on Wednesday, September 13, 1961. On that date the Commission convened and took oath of office. It was addressed by the Governor with respect to the importance of its work and objectives. It adjourned to the office of the Attorney General, which was its headquarters throughout its period of activities. The entire resources of the office of the Attorney General were placed at the disposal of the Commission.

The full Commission concluded fifteen meetings of substantial length, in addition to separate investigations and studies conducted by the Attorney General and by various members of the Commission. Following the third meeting, a subcommittee on drafting composed of Professor Robert Braucher of Harvard Law School and Professor Paul M. Siskind of Boston University Law School was established and to which Mrs. Fremont-Smith was assigned. This subcommittee met separately following each Commission meeting for the preparation of initial drafts of the proposed legislation as it was developed in the regular full meetings.

The Commission was supplied with basic reference materials as indicated in the next section, and was furnished with copies of minutes of each meeting and proposed drafts of legislation, section by section, as the same were prepared by the drafting subcommittee. On March 8, 1962, the

Commission reviewed the completed draft of the proposed legislation, and ordered final revisions. These revisions were prepared and the final draft submitted for approval on March 15, 1962. On the same date this report was approved.

Reference Materials

In the course of its study, the Commission made basic use and employment of the excellent Report submitted by the Massachusetts Legislative Research Council relative to conflicts of interest dated May 15, 1961, and of the sources and materials referred to in that report. It also used as a basic text the extensive three hundred thirty page bound study entitled "Conflict of Interest and Federal Service" prepared by a special committee on the Federal conflict of interest laws by the Association of the Bar of the City of New York (Cambridge, Harvard University Press, 1960).

As a format and pattern of the proposed legislation, the Committee used the bill numbered HR 8140, in the Congress of the United States, which was entitled "An Act to strengthen the criminal laws relating to bribery, and for other purposes". This Federal bill had passed the House of Representatives in 1961 and in 1962 was enacted in modified form in the United States Congress. Much of the language of the proposed legislation is taken and adapted from this bill. In connection with that bill, the Commission also employed the report of the Federal House of Representatives Committee on the Judiciary which reported it favorably.

The Commission also utilized independent studies and reports and considered the existing General Laws of Massachusetts bearing on the subject, as well as codes of ethics and conflict of interest statutes from Kentucky, New York and other jurisdictions and opinions of the Attorneys General from those states.

The heads of each department and agency of the Commonwealth were requested to furnish all data, regulations and material on the subject matter applicable to and used in such department or agency. All of the data was turned over to the Commission.

Following its initial study and investigation, the Commission set about to draft the legislation it deemed essential.

The Commission's examination of c. 268A of the General Laws, the present "Code of Ethics", disclosed that the spirit of this legislation was excellent, and its policy directed toward these necessary objectives, but that in and of itself, it was not adequate to do the job. This statute was neither sufficiently extensive nor sufficiently decisive.

The proposed legislation included broad coverage of bribery, supplanting most of the existing legislation on this subject, and broad coverage of conflicts of interest, including all representation by public officials of interests adverse to the state, county or municipality and the holding of any financial interests or deriving of any financial benefits by public officials in any transactions with the state, county or municipality involved. The original preamble of the present code of ethics was retained and a modified set of Standards of Conduct included.

A final report was presented to the Legislature with the urgent and wholly unanimous recommendation that the proposed legislation be enacted by the Great and General Court.

Hearings on the proposed legislation were held on May 10, 1962 at which I and other members of the Commission appeared. The bill was given final approval on July 26, 1962.

Outside of three minor changes provided by the General Court, the legislation as submitted by the Special Commission was enacted as recommended. The act will not take effect until May 1, 1963.

Almost immediately upon passage, the Attorney General's office received requests from state officials concerning the interpretation of various sections of the statute, particularly those regarding the definition of special state employees and former state employees.

Division of Public Charities

The activities of the Division of Public Charities during the past year have been centered on improving the functioning of the division, consolidating changes introduced in the previous year, and augmenting and refining the powers of the Division through legislation and regulation.

Legislation

Three bills were filed with the General Court by the Attorney General for the Division of Public Charities in 1962. At the hearing of the Joint Committee on Mercantile Affairs, their purposes were explained by the staff of the division and members of the Advisory Committee. All three bills were approved by the Legislature and are now in effect. They make the following changes:

1. General Laws, c. 12, s. 8 has been amended by adding a new § 8J which states:

> "The trustee or trustees or the governing board of every public charity established, organized or chartered in the commonwealth shall file with the division a copy of its charter, articles of organization or agreement of association, or instrument of trust, and a true copy of its constitution and by-laws within thirty days following the issuance of such charter, or the execution of such instrument of trust, or the creation of such public charity, and shall also file with the division any amendments to its charter, articles of incorporation, instrument of trust, constitution or by-laws, within thirty days after adoption. Upon an information in equity by the attorney general, the supreme judicial or superior court may compel compliance with the provisions of this section."

This in effect creates a true registry of charitable funds and institutions in the division. Prior to its passage, a charity was only required to file an annual financial report with the division by June after the first year of operation. It was also difficult to assess these reports without a copy of the trust instrument or corporate charter. The division views this legislation as being of major value for its supervisory functions, particularly in the regulation of inter vivos trusts where there has been no mandatory record or depository for such instruments.

2. General Laws, c. 12, § 8II, as enacted in 1954, requires that public charities shall file annual financial reports which shall include, ". . . the aggregate value of endowment and other funds, the aggregate value of real estate, and the aggregate value of tangible personal property held and administered by the public charity . . . and the aggregate income and the aggregate expenditures of the public charity for such fiscal year. . ."

It has long been realized that the mere listing of aggregate figures was not adequate to give a true picture of the financial affairs of a charitable fund or organization and the reporting forms used since 1957 have requested additional information. The aim of the new legislation was to allow the Division of Public Charities broader power and greater flexibility in relation to the information required from public charities. Thus c. 12, § 8H has been amended by the addition of the following words: "each aggregate figure required being accompanied by an itemized statement on forms provided by the director, of the component parts of such aggregate assets, income and expenditures."

While no changes in Form 12 were made in the current year, it is recommended that consideration be given to the desirability and feasibility of requiring a detailed listing of all securities, as well as more specific information as to the beneficiaries or charitable contributions.

3. The third bill was designed to clarify the statutory machinery for dissolution of charitable corporations, with a guarantee that any funds involved would continue to be used for charitable purposes. Prior to the enactment of this bill, charitable corporations seeking dissolution used the procedure in c. 155 which relates to business corporations and provides no guarantee for cy pres application of funds. There are several early cases in which the Supreme Judicial Court stated that the provisions of c. 155 did not apply to public charities, so that it was felt that a clarification was in order. Two other factors led to the drafting of this legislation. One was the feeling of the division that the power to dissolve inactive public charities should rest with the Attorney General, as overseer of all charitable funds. The second was that many individual Massachusetts charitable corporations were having trouble obtaining tax exempt status from the Federal Internal Revenue Service because the bureau did not feel that the Massachusetts case law stated clearly enough the requirement that funds donated to a charitable corporation were required to be applied cy pres on dissolution.

The new statute, which is c. 180, § 11A, contains two methods of dissolution. One of these is to be used by a charitable corporation which contemplates dissolution, the second to be used by the Attorney General in the case where a corporation has failed to file reports for two years or where he is convinced that a charitable corporation is inactive and that its dissolution would be in the public interest.

This bill became effective in August, 1962 and by that date there had been six requests for action by the Attorney General under § 2 of the statute or for advice on using § 1. The Attorney General has brought three cases seeking dissolution before the Supreme Judicial Court which will be heard during the first week of January. One of them, initiated by the office, will

rectify a situation which has persisted for many years involving a large sum of money as well as cemetery property.

With powers created by these three bills, Massachusetts now has the most far-reaching and effective legislation dealing with accountability of public charities of any of the fifty states. Individual members of the Advisory Committee were consulted in the drafting of these bills and their aid was invaluable in their preparation, as well as in the success with which they passed the General Court.

Regulations

During 1961 members of the Division of Public Charities, working with a sub-committee of the Advisory Group, drafted regulations governing the activities of the Division. These were published on January 25, 1962. Comments were received by February 15, and they were approved by the Governor and Council on July 12, 1962, and have been in effect since July 26, 1962, as provided by c. 30A, § 5.

Article I of the regulations deals with the term "public charity" in terms of legal framework and provides a guide as to whether a charitable trust holds property for "any religious purpose" and is thus exempt from the reporting provisions of § 8F.

Article II deals with the filing of reports under § 8F and defines some exemptions from the filing requirements. Other sections deal with charities which hold funds for religious and non-religious purposes; situations where there is a possible conflict of law; machinery for obtaining extension of time for filing reports, and requirements in regard to signatures.

Article III contains detailed provisions for investigatory proceedings of the administration of a public charity, while Article IV contains provisions for adoption, amendment or repeal of regulations. Several hearings have been conducted under the procedure in Article III, and the provisions of Articles I and II are used daily to decide on requests for exemptions or interpretations of c. 12.

Directory of Public Charities and the Continuing Search for Non-Reporting Funds.

The search for non-reporting funds undertaken in 1961 was continued and expanded, with the result that 647 charitable funds were added to the registry in the first ten months of 1962 — making a total of 1,002 new listings since the inception of this phase of activity. A Supplement to the *Directory of Public Charities in Massachusetts* was compiled in August 1962 and contained the additional charities as well as corrections, consolidations and dissolutions occurring since the original publication.

This supplement was mimeographed by the staff of the Division of Public Charities, but the printing of a new addition will be necessary in 1963 if the Directory is to remain an accurate, useful record of charitable funds in the Commonwealth.

Investigations of Public Charities

Investigation of misapplication of charitable funds is the main function of one of the Assistant Attorneys General assigned to the Division of Public Charities. Routine procedure consists of evaluation of all financial

reports filed with the Division, first by the Executive Secretary, then by the Assistant Attorney General. In some cases an accountant will be called in to do intensive review of certain reports, while in others a member of the State Police will undertake certain aspects of the investigation. During the year 1962, one hundred thirty-two inquiries were sent out as a result of the first scrutiny. They comprise the following categories: loan questions, excessive cash on hand, incomplete reports, small or no charitable expenditures, and requests for copies of trust instruments. In many cases, this first letter was sufficient to settle a case, but others were marked for further investigation and administrative hearing. Loans to and from charities are very carefully perused to see that there is compliance with the law in regard to self-dealing. In two cases it was discovered that insurance policies paid for by a charitable trust on the life of the settlor were not irrevocably the property of the trust and these situations were rectified. Recommendations to diversify investments were accepted by several different charitable funds and in fifteen cases where there had been an unwarranted accumulation of income, the funds have now been distributed to charitable beneficiaries.

Special investigations were also conducted into irregularities which had been brought to the attention of the division by reliable outside sources and in many instances investigation will reveal a dispute between two conflicting factions of a given charitable organization. In one instance, however, a valid complaint led to action by the Attorney General against Burrage Hospital Association, which is discussed below. In another case, the division cooperated with the directors of a charitable hospital to prevent an illegal sale of securities of a closely owned company held by a charitable corporation.

It has been the feeling of the division that these routine investigations are as important in their over-all influence on all charitable organizations, as on those immediately affected. In many cases, ignorance has led to abuses which are easily and willingly rectified. It is only in rare instances that individuals have purposefully used charitable funds to their own advantage. The policy of the division, therefore, has been to attempt to take care of routine matters without undue publicity, since it is understood that bad publicity may, in the long run, discourage the growth of philanthropy in the Commonwealth.

Cemetery Funds

Unsegregated perpetual care funds, established by cemeteries which are engaged in the sale of cemetery lots with perpetual care, were ruled by the Attorney General in 1960 to be trust funds for a public purpose.

More than 700 cemeteries within the Commonwealth submitted reports on request. Of these, approximately 80% were exempted from filing annual financial reports because they were affiliated with religious organizations, were city or town-owned, abandoned or privately owned. The other 20% were classified as holding trust funds for a public purpose within the ruling and about half of these are at present filing financial reports. They have been processed in the same manner as reports from public

charities. About 1,500 other cemeteries did not reply to the initial request for information and are being contacted again.

As a result of this supervision several irregularities have been rectified and once the task of initial rulings is completed, these funds can be treated in the same manner as other charitable funds. The division has also cooperated with officials of several city and town Cemetery Commissions seeking to consolidate trust funds left for individual perpetual care.

Probate Matters — Cy Pres

General Laws c. 12, § 8G states that "the Attorney General shall be made a party to all judicial proceedings in which he may be interested in the performance of his duties under section eight." This statute codified the Common Law practice in the Commonwealth which required that the Attorney General be made a party to any probate proceeding in which a gift to charity was involved. It creates a large amount of the "so-called" routine work of the division. One legal assistant reviews all wills, executors and trustees' accounts, accounts containing charitable bequests, as well as miscellaneous petitions, such as for sale of property. In the case of testamentary trusts where the proceeds are being paid to a life beneficiary, this is a vital means of assuring that the ultimate charitable interest is being protected.

Prior to passage of c. 12, § 8G, the practice of citing the Attorney General in these cases varied from county to county. The practice has become more uniform in more recent years, and, as the result of *Buden* v. *Levy*, 343 Mass. 644, decided February 19, 1962, there should be less question as to the need for notice. This case involved an appeal from a decree of the Probate Court approving an agreement of compromise of a will which provided for distribution of an estate free of trust. The ultimate beneficiary was a public charity. The Attorney General was not a party to the proceedings at any stage during probate of the will, nor of the hearing on the compromise agreement. The appeal by the Executor of the Probate Court's decision was argued at the September sitting of the Supreme Judicial Court in Franklin County. Then, on December 20th, 1961, at the request of the Chief Justice, the Attorney General filed an appearance in the case and a brief, and later submitted his rights.

The decision of the Court affirmed the lower court decree, and in the text mention is made of the fact that the Attorney General was made a party to the case at the Court's direction.

The Attorney General, through the Division of Public Charities, also participated in one other case heard by the Supreme Judicial Court in which they joined in a brief with the Christian Science Church.

Several matters were argued before the Single Justice Session of the Supreme Judicial Court for Suffolk County, the most noteworthy being *Franklin Foundation* v. *Attorney General*. This case involved a petition by the trustees of the trust fund established under the will of Benjamin Franklin to provide loans during a 200 year period to young artificers under certain specified conditions. No loans had been made since 1886. A petition by the trustees in 1960 to terminate the trust had been refused

by the Supreme Judicial Court in a decision in which the Court suggested that a program might be found for the loans within the general intent of Franklin's will. The trustees in the recent case requested the authority to make loans to medical students, residents and interns under a plan whereby an independently organized foundation had agreed to provide a $100,000 guarantee for the loans. The Attorney General, after consultation with the Advisory Committee, filed an answer and brief in which he requested the court to broaden the scope of the plan so that loans could be made to those in training in other technical sciences or crafts. The final decree embodied this suggestion and the first loans have now been made.

In a second case involving the Franklin Foundation, the Court was requested to interpret the wording of a gift made by Andrew Carnegie to Franklin Institute, the technological school established by the trustees of Benjamin Franklin's will at the end of the first 100 year period of the trust. The Attorney General submitted his rights in this case to the determination of the court, which held that this gift from Andrew Carnegie could not be used by Franklin Institute to purchase land for expansion.

Several cases involving charitable trusts were also heard in the various county Probate Courts and will be mentioned briefly:

1. A petition for instructions filed by the trustees under the will of Catherine Johnson for the use and benefit of the Johnson Home for Aged Women, requesting the court's determination of their duties in respect to this trust. The property of the trust consists of a dwelling in North Andover given to be used as a home, and funds now valued at approximately $117,000 to be used for support of said home.

The petition alleged that it was impossible to carry out the testator's intent to establish a home for aged women and requested the court as to whether they should make the dwelling marketable and sell same; and also whether the trust estate should continue to be held by them, applied in some other manner or revert to the heirs. The Attorney General filed an answer requesting the court to instruct the trustees to petition for cy pres application of the property. Counsels for the heirs filed answers requesting the court to have the property revert.

Memoranda of law were prepared by all parties. The decree of the Probate Court for Essex held that 1. the trustees should not distribute any property of the said trust to the residuary legatees under the said will; 2. the trustees are instructed to present an appropriate procedure for the administration of the trust in accordance with the doctrine of cy pres. The heirs have filed an appeal of decision in the Supreme Judicial Court, which will be heard early in 1963.

2. In the case of *Jacobson* v. *Walsh*, which has also been appealed to the Supreme Judicial Court, ten taxpayers of the City of Boston brought a petition in equity under G. L. c. 214, § 3(1) against the Chairman and members of the Parks and Recreation Commission, Parks and Recreation Department of the City of Boston, to prevent the proposed sale of land given to the City of Boston for park purposes. The Attorney General's petition to intervene on the grounds that there was a violation of law in

that the proceeds of said sale had not been designated for park purposes was allowed. Briefs were filed by all parties, and a final decree was entered on July 6, 1962 permanently enjoining the city from selling the land in question except as part of a plan to adjust the park area of which it is a part and arranging for acquisition of other park land to be purchased with the proceeds of such sale. This case will also be heard by the Supreme Judicial Court early in 1963.

3. The Attorney General has obtained an injunction against sale of Bumpkin Island in Boston Harbor, leased for 500 years by Harvard University to Burrage Hospital Association, and a petition for an accounting and cy pres of the funds and property is now pending. The island was the site of a children's hospital from approximately 1903 to 1914, but has been unoccupied since the end of the First World War. No reports have ever been filed with the Division of Public Charities and there appears to be no possibility that the hospital can be reactivated.

4. Several other cy pres petitions have been filed by trustees at the instigation of the Division of Public Charities and during this past year four were allowed, involving substantial sums of money which are now being actively used for charitable purposes.

As in the past, this is considered one of the most valuable contributions of the division. Early in 1963 the Town of Weymouth will be presenting a petition to allow the trust fund of nearly one million dollars left to the Town under the will of Laban Pratt to establish a hospital in Weymouth to be transferred cy pres to the South Shore Hospital in Weymouth to build a Laban Pratt wing, with the South Shore Hospital providing an additional one million dollars for the project. The division has participated in the negotiations leading to this petition and will appear in court in its support.

SOLICITATION

During 1962 all records of charitable solicitation required by c. 68, § 17, to be filed with the Attorney General were reviewed and consolidated with the financial reports required under c. 12, § 8F.

This has created a more efficient method of processing and has facilitated the evaluation of both types of reports. In January, 1962 letters were sent to all public relations firms, advertising companies and fund raising specialists in the Commonwealth, reminding them of the requirements of c. 68 that all paid solicitors must file reports on their activities or be subject to criminal action.

Investigation and hearings were held in four cases, each of which has resulted in correction of abuses. Several others are pending investigation by the State Police. In one of these the charitable organization was raising funds by means of a used clothing collection under a contract with a firm. It was revealed that the costs of such activity were 85% of the total received. The contract with the salvage firm has now been cancelled. In another case, a charitable fund drive conducted a party where gambling devices were used to obtain additional revenue. The division cooperates

regularly with cities and towns which require licenses for solicitation, with the better business bureaus, chambers of commerce and other independent organizations interested in imparting information about this field.

For a short time in early 1962 a state trooper was assigned to the division, but the press of activities of the Criminal Division in the Attorney General's Office necessitated his transfer. It is strongly recommended that one State Police Detective be assigned permanently on a full time basis to the Division of Public Charities, for without such continuity, investigation and correction of abuses is seriously hampered.

The regulation of solicitation practices continues to be a serious problem in a few specific cases. The division still feels that c. 68, § 17 is unclear, inadequate and in need of revision. A proposal by representatives of the United Fund to file legislation creating a licensing system similar to that used in Los Angeles County was explored, but further study is necessary before attempting to revise so drastically the existing system.

PUBLIC ADMINISTRATION

The Division of Public Charities, acting for the Attorney General, represents the Commonwealth in all court proceedings involving public administration and estates of absentees. Approximately 1,039 public administrations, involving 61 Public Administrators, were reviewed in 1962 covering such matters as: appointments of public administrators, (2) review of all accounts filed, (3) review of all petitions for sale of real estate ascertaining assessed value of property, purchase price and interest of purchaser in estate, (4) review of all petitions for distribution, (5) collection of all funds escheating to the Commonwealth. The office appeared in court on several matters and in others filed memoranda of law. For example, in one case the Attorney General appeared to uphold appointment of a Public Administrator against claim of an employer to be administrator and in another, the Attorney General prevailed in a disagreement with a Public Administrator as to the relationship of a distributee, while in two other cases the office supported the rights of the Commonwealth when there was a question as to interpretation of gifts in a will and no heirs at law. The division also reviewed matters involving 202 absentees.

Summary

I should like to conclude this report with a discussion of the regulation of charitable activities outside of Massachusetts, where there has been considerable interest and activity during this past year.

In 1954, when the Massachusetts General Court created the Division of Public Charities and established the reporting system, there were three other states with similar provisions for state supervision of charitable funds; New Hampshire, Rhode Island and Ohio. They have since been joined by California, Iowa, Michigan and Illinois. In addition, Maine, New York, Oklahoma, New Mexico and Minnesota have statutes which require accounts from funds conducting public solicitation. There is now evidence of an increasing interest in the regulation of charitable trusts and foundations among the other states, the foundations themselves, and in the United States Congress.

The division has maintained a highly profitable exchange of views with the seven states which require financial reports from charitable funds. In addition, it has answered requests from interested individuals in Missouri, Pennsylvania and Wisconsin who are working for enactment of legislation in their respective states.

The impetus to further state action has come in part from an investigation being made by Congressman Wright Patman of Texas, Chairman of the Select Committee on Small Business of the House of Representatives. Congressman Patman has released several statements to the press in the last two years and on December 31, 1962 published a 135 page report entitled "Tax Exempt Foundations and Charitable Trusts — Their Impact on our Economy". This report contains a study of the financial activities of 534 funds during the period 1951 through 1960. While many of Congressman Patman's final recommendations for revision of the tax law are of great value, it is considered unfortunate by many that he has approached the problem from the point of view that, to quote from his letter of transmittal, "Unquestionably, the economic life of our Nation has become so intertwined with foundations that unless something is done about it they will hold a dominant position in every phase of American life." and has urged "an immediate moratorium of foundation tax exemption."

One direct result of the Congressman's statements has been an attempt by the Register of Charitable Trusts of California, Mr. Frederic Auforth, and the Assistant Attorney General for Charitable Trusts in Ohio, Mr. John D. Barricklow, to alert the states and the National Association of Attorneys General to the need for a uniform charitable trust law and a standard system of accountability established as a separate division or department in the offices of the Attorneys General of all the fifty states. These men have been joined by Mr. Ernest D'Amours, supervisor of Charitable Trusts in New Hampshire, in seeking the establishment of a national center for information on regulation of charitable activities. They feel strongly that supervision is the responsibility of the individual states and will prove more effective and workable than under a federal agency.

Our experience in Massachusetts substantiates this view. I would add that it is our feeling that the regulation of charitable activities is more than a question of tax exemption, involving as it does the law of trusts of each state. The creation of a national regulatory agency would not meet the problems of misfeasance by trustees, maladministration of funds, or the need for a responsible authority to encourage cy pres actions for inactive charities. In some instances it might well encourage practices which are inconsistent with the standards long established for administration of trusts by the courts. I believe the experiences in New Hampshire, Rhode Island, California and Ohio, as well as in our own state, provide ample evidence that it is possible to establish effective supervisory machinery at a state level. The Michigan and Maine programs have just commenced, but give every indication that they will be vigorously administered. If more states take action in the near future to establish accountability statutes, and if the Patman study leads to more efficient supervision by the Internal

Revenue Service of the tax aspects of the problem, there is little doubt that the entire field of charitable activity will be benefited.

As a final word, it should be pointed out that there is a growing awareness among the larger charitable foundations themselves of the need for public accountability, led primarily by Russell Sage Foundation, which has long had a primary interest in the field of philanthropy, and the Foundation Library Center, which was established in 1956 to assemble and disseminate information concerning foundation activity.

Massachusetts has long held a position of leadership in the field of charitable trusts, dating back to the earliest decision of the Supreme Judicial Court. The ground work for an effective and efficient program of supervision of charitable funds within the Commonwealth is now well established, and it is hoped that we may continue to perfect and refine this program for the greater benefit of all the citizens of the Commonwealth.

Title Land Cases

The Attorney General's office is charged with the duty of protecting the rights of the Commonwealth in the lands owned by the Commonwealth and in lands owned by private individuals where public rights are concerned. This includes the protection of public rights in the great ponds, and in the tidewaters of the Commonwealth, for fishing, fowling and navigation.

Several petitions were filed for the establishment of access to great ponds, and in accordance with the statute, the office was represented at hearings before the Public Works Commissioner in reference to these petitions.

During this fiscal year, 142 petitions for registration in the Land Court involved in some way the rights of the Commonwealth. In some cases pleadings were filed to protect the fee takings made in public highways taken by the Department of Public Works on behalf of the Commonwealth or of cities and towns; in others, to protect various takings made by the Metropolitan District Commission, or other departments, to protect the rights of the public in the tidewaters of harbors, bays and rivers, and to protect the rights of the public in the great ponds of the Commonwealth.

1249 cases on land takings made by the Department of Public Works were forwarded for approval of the releases obtained therein. While these releases are approved only as to form, nevertheless, it is necessary to check the title to be certain that all possible interests in the property taken have been properly released. Great care is taken to make certain that all inheritance taxes due the Commonwealth, and all taxes and betterments due the cities and towns are paid before any part of the settlement is paid over to the owner.

Various departments of the Commonwealth, such as the Department of Natural Resources, the Department of Education, the Armory Commission, the Department of Mental Health, either sold, acquired or took property by eminent domain during the year. Close contact was maintained with these departments and advice was given as to procedure to be followed, documents were prepared, and opinions as to the state of the title and steps necessary to clear the same were given. All deeds conveying title to

the Commonwealth and all deeds conveying title from the Commonwealth were approved as to form.

Much time was spent in preparing an Information in Equity in a case where it is believed there has been encroachment or trespass in Congamond Lakes.

One case argued in the Supreme Judicial Court during this period, the case of *Johnson* v. *McMahen*, 343 Mass. 348, was of great importance in quieting titles to land. In this case the defendant sought to invalidate certain acts of the Commissioner of Corporations and Taxation which preceded the foreclosure procedure of low-value lands which had been taken for taxes. The Court affirmed our argument in the matter that General Laws c. 60, § 79 was designed as a means more economical and more expeditious than the judicial method of foreclosure of tax titles while affording reasonable administrative safeguards to protect the rights of the owner, in cases where the land taken was of low value. The Court held that it provided for a final and effective termination of redemption rights in land validly taken, where the affidavit of the Commissioner is issued and recorded, where the treasurer otherwise complies with the provisions of § 79, and where the treasurer's deed is properly recorded within sixty days after the sale.

Collections

Collections for the year totaled $118,919.61. Listed below is a breakdown for each department:

Mental Health	53	$ 85,060.37
Public Works	162	15,573.35
Metropolitan District Commission	20	5,070.67
Public Health	24	10,316.05
Correction	1	5.05
Education	5	1,255.95
Labor and Industry	1	62.70
Natural Resources	6	805.42
Office of the Secretary	1	395.25
Parole Board	1	95.53
Public Safety	1	100.00
Public Welfare	2	134.27
University of Massachusetts	1	45.00
	278	$118,919.61

Worcester Office

During the fiscal year ending in June, 1962, and to the end of the administration an Assistant Attorney General as well as a Legal Assistant have been assigned to the Worcester area. Both have been busy handling the many duties assigned to them. The Assistant Attorney General has attended all the hearings of the Motor Vehicle Insurance Appeal Board held in Worcester. The majority of the work done has been in connection with the preparation and disposition of eminent domain cases, either by settlement or by trial. The Assistant has also handled motor tort cases and workmen's compensation cases for the Worcester area. Continuing the practices

instituted by this administration, the Assistant assigned to the Worcester area has welcomed the opportunity to make his experience and knowledge available to many of the surrounding towns in the solution of their problems.

Although an actual office has not been set up with secretarial staff, there has been an increased amount of service to the members of the bar in Worcester County in their relations with the office of the Attorney General in Boston. An increased number of citizens in the Worcester area has become aware that an Assistant Attorney General has been assigned to the Worcester area to serve their needs. It is to be hoped that in the future sufficient funds might be appropriated to permit the setting up of an office for the Attorney General with adequate secretarial staff in the City of Worcester. If this were done it would facilitate the work of the Attorney General's office in the Worcester area and make for more efficient operation.

Conclusion

This report concludes my service as the chief law enforcement officer and legal advisor of the state for a period of more than four years covering two full terms for which I was elected by the people and a short period in the Fall of 1958, when, after my nomination as the Democratic candidate for the office at the State Primary in that year I was elected by the Legislature to fill the vacancy resulting from the death of George Fingold.

In retiring from my legal and law enforcement duties, I express my appreciation to those who have served as members of my staff, to the Governor, the other constitutional officers, the members of the Legislature and the various executive officials of the State and Federal governments whose departments and offices it has been my pleasure to serve.

Respectfully submitted,

EDWARD J. McCORMACK, Jr.
Attorney General

OPINIONS

The view that Constitution requires places of town meetings for elections, and probably for other purposes, be within town's limits, stated in considering legislative proposal authorizing holding town meetings in regional schools.

JULY 17, 1961.

MR. HERMAN C. LOEFFLER, *Director, Legislative Research Bureau.*

DEAR SIR: — In your recent letter you request an opinion relative to House 2017 proposing the addition of a new § 10A of c. 39 of the General Laws.

The proposed § 10A which you have referred to reads as follows:

"Any town which is a member of a regional school district may call and hold a town meeting in the regional school by agreement with the school committee of said regional school district. A town meeting originally called to meet elsewhere may vote to adjourn to the regional school by a similar agreement."

In your letter it appears that the Legislative Research Bureau has voted to request our opinion as to whether any constitutional barrier exists with respect to the enactment of the proposal above referred to.

Doubtless you are aware of the fact that there are two types of town meetings. The annual meeting, which, by G. L. c. 39, § 9, is required to take place in February, March or April, and special town meetings which are held under warrants issued by the selectmen (G. L. c. 39, § 10). Generally speaking, the constitutional and statutory pattern of the Commonwealth is based upon the assumption that the town meetings are to be held within the geographical limits of the town (G. L. c. 29, § 9). Said § 9 reads as follows:

"Except as otherwise provided by special law, the annual meeting of each town shall be held in February, March or April; and other meetings may be held at such times as the selectmen may order. Meetings may be adjourned from time to time, and to any place within the town."

At the annual town meeting the election of the municipal officers and the transaction of the business of the town are usually held at separate sessions, sometimes on the same day but more often, especially in the larger towns, on different days. In any event, the election and the business meeting are treated as parts of the annual town meeting.

Many of the towns, for purposes of election, are divided into voting precincts whereby the voters of each described precinct are called upon to cast their ballots in specified locations in the precinct in the town (G. L. c. 39, § 20). For about three-quarters of a century our statutes have provided that if a town officer removes from his town, he thereby vacates any town office held by him (G. L. c. 41, § 109).

As you state, Article XXIX of the Amendments to the Constitution of Massachusetts expressly provides that the General Court shall have full power and authority to provide for the inhabitants of the towns in this Commonwealth more than one place of public meeting *within the limits of each town* for the election of officers *under the Constitution*. It is my judgment that this provision contains at one and the same time a grant of

authority and a limitation upon that authority. The General Court is authorized to provide for the inhabitants of the various towns places for election, but those places are to be "within the limits" of the town. The founding fathers were far-sighted; means of transportation were limited when the Constitution was put together. Their primary purpose was to insure free and open elections; to bring this about it was necessary that the voting places should be accessible to the voters within the town, since the town elections were an integral part of the annual town meeting.

In my opinion, therefore, the proposed § 10A runs contrary to the constitutional provision I have referred to, at least so far as it would permit an annual town meeting for the election of town officers in a neighboring town. It might be suggested that the constitutional limitation applies only to the election of constitutional officers. I do not see the situation in that light. State constitutional officers are provided for by the Constitution. Municipal officers are provided for by statute under constitutional authority. *Moore* v. *Election Commissioners of Cambridge*, 309 Mass. 303, 314.

In so far then, at least as town meetings for election purposes are concerned, in my opinion, they should be held within the municipal limits. Whether town meetings in whole or in part for other than election purposes may be held beyond the municipal limits may now be considered. As I have said, the statutory pattern for over a century and a half indicates to the contrary. General Laws c. 39, § 9, originating in 1785, to which I have already referred, indicates to the contrary. Except perhaps for one or two isolated instances, the entire history of political government in this Commonwealth, covering centuries of time, is bare of evidence of town meetings held beyond the town limits. Such a uniform practice over such a long period in such an important matter may well be considered pursuasive evidence of the legal propriety of the practice. Cases holding that town meetings held beyond the limits of the town are invalid are collected in 63 Corpus Juris, page 124, note 68, and 87 Corpus Juris Secondum, page 43.

The laws relating to regional school districts may be found in G. L. c. 71, §§ 14 to 20, inclusive. Read together, they provide a method whereby several municipalities may become a separate corporate entity for educational purposes. Whether these provisions alter the time-honored and traditional law requiring town meetings to be held within the municipal limits may be a matter of some doubt. However, the Supreme Court in the case of *Commonwealth* v. *Hudson*, 315 Mass. 335, 345, used the following language:

"But the powers of a town and of its town meeting, and the very existence of the town, are subject to the will of the Legislature."

Of course, however, the General Court is itself bound by constitutional limitations.

It is my opinion that a town, with the approval of the regional district school committee, may hold a town meeting within the corporate limits. It seems to me, however, unwise, lacking further word from the Supreme Court, to encourage the General Court in the enactment of general legislation such as is contained in the proposed § 10A, specifically in view of the fact that both local, special and State elections are inextricably interwoven and form a part of town meetings.

Very truly yours,
EDWARD J. MCCORMACK, JR., *Attorney General*,
By FRED W. FISHER, *Assistant Attorney General*.

Appropriation for waterways projects contained in St. 1961, c. 544, requiring local contribution of fifty percent of cost, could not be used for constructing the sea wall in Hull under St. 1961, c. 31, in which the town's contribution is fixed at less than fifty percent of the cost.

JULY 19, 1961.

MR. RODOLPHE G. BESSETTE, *Director, Division of Waterways Department of Public Works.*

DEAR SIR: — In your recent letter you refer to the proposed method of financing the State's share of the cost of the construction of a sea wall in the Kenberma section of the town of Hull.

You refer to St. 1961, c. 31, authorizing and directing the Department of Public Works, through the Division of Waterways, to construct a sea wall for the purpose of protecting the shore of the town of Hull from flood and erosion by the sea, and providing that the department may use "any available funds for said purposes." The act referred to further provides that no work shall be done until the town of Hull has assumed liability in the manner provided by G. L. c. 91, § 29, for all damages which may be incurred under the act and there has been paid into the State Treasury the sum of $136,000 which shall represent the town's share for the work to be done under the act.

You state that the estimated cost of the proposed work, including the costs of engineering during construction, is $700,000. You further state that the town of Hull has available and will contribute the sum of $136,000 toward the cost of construction and that the State's share of the work will be $564,000.

You inform us that "In financing the State's cost, it is proposed to allot the sum of $136,000 from c. 544 of the Acts of 1961 (Item 8262–22) and to allot the sum of $328,000 from either c. 604 of 1959 (Item 8260–61) or c. 774 of 1960 (Item 8261–44)," and ask to be advised "whether or not this proposed method of financing the State's share of the cost of this project is a proper one."

Acts of 1961, c. 31, was enacted on February 9, 1961. The act has an emergency preamble and therefore, by force of the provisions of G. L. c. 4, § 1, it took effect immediately upon the date of its enactment.

Item 8260–61 of St. 1959, c. 604, § 2, reads as follows:

"For the improvement, development, maintenance and protection of rivers, harbors, tidewaters, shores and great ponds; construction, reconstruction or removal of dams; construction, reconstruction or repair of town or city piers and wharves, the state pier in New Bedford and the state pier in Plymouth; construction, reconstruction or repair of drains; within the commonwealth, as authorized by section eleven of chapter ninety-one of the General Laws, to be used in conjunction with any federal funds made available for the purpose, to be expended with contributions from municipalities or other organizations and individuals; provided, that this item shall not be subject to section thirty A of chapter seven of the General Laws, to be in addition to the amount appropriated in item 8259–93 of section two of chapter six hundred and fifty of the acts of nineteen hundred and fifty-eight."

Item 8261–44 of St. 1960, c. 774, § 2, reads as follows:

"For the improvement, development, maintenance and protection of rivers, harbors, tidewaters, shores and great ponds; construction, recon-

struction or removal of dams; construction, reconstruction or repair of town or city piers and wharves, the state pier in New Bedford and the state pier in Plymouth; construction, reconstruction or repair of drains; within the commonwealth, as authorized by section eleven of chapter ninety-one of the General Laws, to be used in conjunction with any federal funds made available for the purpose, to be expended with contributions from municipalities or other organizations and individuals; provided, that this item shall not be subject to section thirty A of chapter seven of the General Laws, to be in addition to the amount appropriated in item 8260–61 of section two of chapter six hundred and four of the acts of nineteen hundred and fifty-nine."

Acts of 1961, c. 544, is the Special Capital Outlay Appropriation Act for the current year. Item 8262–22 of § 2 of said act reads as follows:

"For projects for the improvement of rivers, harbors, tidewaters, foreshores and shores along a public beach, as authorized by section eleven of chapter ninety-one of the General Laws, and for construction, reconstruction or repair of drains, to be used in conjunction with any federal funds made available for the purpose; provided, that all expenditures, except the cost of surveys and the preparation of preliminary plans, for work undertaken hereunder, including the cost of engineering during construction, shall be upon condition that at least fifty per cent of the cost is covered by contributions from municipalities or other organizations or individuals except that, in the case of dredging channels for harbor improvements, at least twenty-five per cent of the cost shall be so covered."

Said c. 544 was enacted on May 27, 1961. The act has an emergency preamble and, therefore, took effect on that date.

It is to be noted that under the provisions of Item 8262–22 of St. 1961, c. 544, § 2, all expenditures, except the cost of surveys and the preparation of preliminary plans, for the cost of such projects as the sea wall in question, including the cost of engineering during construction, are upon condition that at least fifty per cent of the cost be covered by contributions from municipalities.

The provisions of Item 8260–61 of St. 1959, c. 604, § 2, and of Item 8261–44 of St. 1960, c. 774, § 2, do not, however, contain such a condition as that just referred to.

On the facts stated in your letter, I see no reason why portions of any available balances of the funds appropriated by the two items last mentioned cannot be used to finance the State's share of the cost of the work contemplated by St. 1961, c. 31.

However, as noted above, Item 8262–22 of St. 1961, c. 544, § 2, contains a condition, referred to above, that fifty per cent of all expenditures thereunder for the cost of projects, including the cost of engineering during construction, exclusive of the cost of surveys and the preparation of preliminary plans, be covered by contributions from municipalities, or other organizations, or individually.

It would appear from the information given us in your letter that the work in Hull contemplated by St. 1961, c. 31, involves a cost, including the cost of engineering during construction, of $700,000, and since the town's contribution of $136,000 towards that cost is less than fifty per cent thereof, I must advise you that the condition set forth in Item 8262–22

of St. 1961, c. 544, to be met to authorize expenditures thereunder, prevents expenditure of any amounts appropriated in that Item on the project authorized under St. 1961, c. 31.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

The State Commissioner of Public Works is the appointing officer of the Director of the Division of Waterways, within G. L. c. 31, § 43. Article 65 of the specifications for waterways contracts, prohibits assignment, etc., without the approval of the Public Works Commission. Performance of a contract by one not the successful bidder, with the latter's consent, could be found to be under an assignment; assignment being a question of fact.

JULY 25, 1961.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have asked my opinion on the following:

Your first question reads as follows:

"1. Who is the appointing authority of the Director, Division of Waterways, Massachusetts Department of Public Works within the meaning of G. L. c. 31, § 43?"

By St. 1950, c. 787, the office of the Director of the Division of Waterways is subject to the provisions of G. L. c. 31.

General Laws, c. 16, § 5A, imposes the responsibility of organizing the Division of Waterways on the Commissioner of the Department of Public Works. It further provides that ". . . The commissioner shall with the approval of the governor, appoint a director to have charge of the work of the division . . ."

In answer to your first question, the Commissioner of Public Works is the appointing authority of the Director, Division of Waterways, Massachusetts Department of Public Works, within the meaning of G. L. c. 31, § 43.

In your second question you ask:

"2. Can a contract awarded to a contractor by the Board of Commissioners of the Massachusetts Department of Public Works be legally assigned, sublet or subcontracted by the said contractor to another without the approval of the said Board of Commissioners?"

A contract for waterways work is awarded by the Board of Commissioners of the Massachusetts Department of Public Works when it approves a contract by majority vote pursuant to G. L. c. 16, § 4.

Article 15 of the "Standard Specifications for Waterways Work" requires that the award be made to the lowest responsible bidder. The responsibility of a bidder is a question of fact to be determined by the awarding authority. (*Capuano, Inc.* v. *School Building Committee of Wilbraham*, 330 Mass. 494, where there was a statutory requirement that the contract be awarded to the lowest responsible bidder.)

Article 12 of the "Standard Specifications for Waterways Work" amply evidences the fact that the determination of the responsibility of a bidder is highly personal. His possession of the necessary facilities, experience, ability, financial resources, and, in some cases, his individual skill and experience may be determinative. The awarding authority's determination of the responsibility of the party with whom it has voted to contract may not be frustrated by assigning, subletting or subcontracting work which the general contractor himself has undertaken to perform. Express prohibition of such assignments or subletting without the prior consent of the department may be found in Article 65 of the "Standard Specifications for Waterways Work."

In answer to your second question, neither the contract itself nor any portion of the work thereunder which the general contractor has, himself, undertaken to perform legally may be assigned, sublet or subcontracted without the prior written consent of the awarding authority.

Your third question reads as follows:

"3. If your answer to No. 2 is in the negative, then if, in fact, the work under the contract is performed by a person other than the contractor, with the consent of the said contractor, would such prosecution of the work constitute an assignment, subletting or subcontracting between the two?"

In answer to your third question, an assignment is a contract subject to the same requisites as to validity as other contracts. It need not be in writing to be valid although some oral assignments may be unenforceable. It is a question of fact whether the doing of work, which is the subject matter of a department's contract, by a third person with the consent of the general contractor to whom the contract was awarded is an assignment. It would appear that a trier of fact would be warranted in finding that the doing of work by a third person with the prior knowledge and consent of the general contractor gives rise to an implied contract, if not an express contract, and would constitute an assignment within the meaning and intent of the term as used in Article 65 of the "Standard Specifications for Waterways Work."

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

Actual re-employment after military service, and not mere reinstatement, of a veteran public employee is required to entitle him to veterans pension benefits.

JULY 27, 1961.

HON. CHARLES GIBBONS, *Commissioner of Administration.*

DEAR SIR: — You have requested a formal opinion concerning G. L. c. 32, § 58A. After referring to the terms of § 58A, you state that in the instant case the veteran you refer to served in the Navy from 1943 to 1945. Immediately prior to his induction into the Navy you state he was employed as a janitor in the Lynn school system. Within two years of his discharge from the Navy he was reinstated, by vote of the school committee of the city of Lynn, but he never did actually return to work for the Lynn school

system. It is further stated that at a later date he formally resigned. In the light of these facts you ask:

(a) "As to whether under the provisions of § 58A of c. 32, the wartime service of this veteran can be deemed creditable for purposes of retirement under the provisions of G. L., c. 32, §§ 56 to 60, as amended."

Section 58A of G. L. c. 32, as inserted by St. 1960, c. 619, § 3, reads as follows:

"A veteran eligible to retirement under section fifty-six, fifty-seven or fifty-eight, who was employed in the service of the commonwealth, or any county, city, town or district thereof, prior to his entry into wartime service as defined in section twenty-one of chapter thirty-one, and upon whose discharge or release therefrom was reinstated or re-employed within two years in his former position or a similar position, shall have credited to him as creditable service the period of his wartime service until the date of his discharge or release from such service, which shall include credit for any actual service in the armed forces between January first, nineteen hundred and forty and July first, nineteen hundred and sixty-two."

The purpose of the General Court in inserting section 58A in the General Laws is benign. It is a recognition by the sovereign of meritorious services of the veteran in times of danger and stress and should be construed broadly to effectuate its purposes. However, its language should not be distorted in order to accomplish undesirable results. Section 58A, as we have seen, authorizes a credit for wartime service if the veteran "was reinstated or re-employed within two years in his former position or a similar position." In my opinion, a man is not to be deemed re-employed who, in fact, never actually was re-employed, nor should a veteran be considered "reinstated" who never, in fact, was reinstated. The purpose of the General Court should not be so subverted. One of the fundamental rules of statutory construction is that we must look beyond the letter of a statute where a literal construction would be inconsistent with the legislative intent. *Price* v. *Railway Express Agency*, 322 Mass. 476, 484. Section 58A is limited by its express terms to veterans who were employed in the service of the Commonwealth or political subdivision thereof. "Service" is defined in G. L. c. 32, § 1, as "service as an employee in any governmental unit *for which regular compensation is paid*." (Emphasis supplied.) I assume from the tenor of the letter that no compensation was paid to or claimed by the veteran within the period referred to after his retirement from the armed forces. "Employee" is defined in § 1 of c. 32 dealing with retirement systems and pensions as, ". . . any person who is regularly employed in the service of any such political subdivision . . ."

In the light of the foregoing, I am of the opinion that the General Court intended the benefits of § 58A to be provided for veterans who in truth and in fact were reinstated or re-employed, and not for the benefit of those who were not actually so reinstated or re-employed. I therefore answer the question in the negative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

A specific statute providing for the extension of the Massachusetts Turnpike into Boston being in effect at the time, the Legislature must have intended that appropriations made for State highway construction be used for other highways than any competitive with the extension, without further legislative sanction, and certain legislative procedure referred to confirms that view.

July 27, 1961.

His Excellency John A. Volpe, *Governor of the Commonwealth.*

Sir: — In your recent letter you requested my opinion and ruling on the following questions:

"(1) Does St. 1952, c. 354, as amended by St. 1955, c. 47, prevent the Department of Public Works from proceeding with the construction of a Freeway from a point within the city of Boston to a point on Route 128 in the vicinity of the Massachusetts Turnpike?

(2) Is legislative authority necessary for the Department of Public Works to proceed with the construction of a Freeway from a point within the city of Boston to a point on Route 128 in the vicinity of the Massachusetts Turnpike?"

Chapter 354 of the Acts of 1952 provided for the construction of a self-liquidating express highway from a point in the vicinity of the city of Boston to the New York State line, created the Massachusetts Turnpike Authority, and provided for the financing of the highway. The method of financing was by the issuance of turnpike revenue bonds payable from tolls to be charged for the use of the turnpike. The act provides that when all bonds issued thereunder have been paid, the turnpike shall become a part of the State highway system, the Authority shall be dissolved and its property shall vest in the Commonwealth.

Chapter 47 of the Acts of 1955 amended the 1952 act to authorize the Authority to extend the toll turnpike to a point or points within the city of Boston.

The Turnpike Authority is constituted a public instrumentality and it is provided that the exercise by the Authority of the powers conferred in the construction of the turnpike and the extension shall be deemed and held to be the performance of an essential governmental function.

The reasonable construction of the specific provisions contained in the 1952 and 1955 acts cited is that it was the intention of the Legislature that they were to provide the sole authority for, and method of, meeting the public need for a modern express highway from a point or points within the city of Boston to the New York State line, and that none of the funds appropriated for the construction of State highways should be used by the State officials to whom they were made available for the construction of such highways to serve the same purposes as the turnpike and its extension.

The 1952 act and the 1955 amendment are presently in full force and effect. As stated, they represent the only provisions that the Legislature has specifically made for a modern express highway from a point or points in the city of Boston to the New York State line.

It is my opinion, in answer to your first question, that the Department of Public Works would not be authorized to use any funds appropriated by the Legislature under the recent statutes providing funds for the con-

struction of State highways for the construction of roads which would be directly competitive with the turnpike or the extension.

The opinion expressed is confirmed by the fact that although the Legislature knew during the last session, as was common knowledge, that the Authority was having difficulties in presenting an acceptable offering of its revenue bonds for the purpose of financing the extension of the turnpike, no legislation was enacted to make any change in the plan of having the extension of the turnpike to Boston constructed as a toll road. It would appear that the Legislature contemplated that the Authority might be able to surmount the difficulties it was experiencing, and was content to postpone consideration of what provisions should be made for the construction of the extension, if it should finally appear that the Authority could not finance the construction of the extension by revenue bonds within the restrictions presently contained in the acts above referred to, to the next session of the Legislature which is now less than six months away.

In answer to your second question, I advise you in accordance with the foregoing, that the Department of Public Works is not presently authorized to proceed with a complete, or partial, substitute for the turnpike extension provided for in the statutes referred to. What legislation could be enacted to provide the department with that authority would depend on what agreements and contracts have been, or may be, made by the Authority with engineers, property owners, bond holders, and others, and the extent to which rights thereunder have so far vested as to require that compensation be made for any impairment of such rights. The final form any such legislation which might be deemed advisable should take is a matter of public policy for determination by the Legislature.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

G. L. c. 30, § 39G, requiring contracting authority to retain amounts to satisfy outstanding liens is not applicable to prohibit progress payments under a State highway construction contract being completed for surety after default; surety acknowledging liability to lienors.

JULY 31, 1961.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have requested an opinion as to whether G. L. c. 30, § 39G, or G. L. c. 149, § 29 (referred to in your letter as St. 1957, c. 682), prohibits payments of semi-monthly estimates to a general contractor in amounts which would reduce the retainage withheld by the awarding authority to less than the amount of the statutory liens filed against the contract. It appears from your letter that you have no question as to the power of the department to withhold payments in an amount sufficient to equal the outstanding liens if it desires to do so.

Your letter states that after the default of the original contractor, the surety arranged for the completion of the work by another contractor. You further state that liens have been filed in the amount of $87,339.96,

and the usual ten per cent retainage on sums paid to the original contractor amounts to $33,774.50. The completing contractor has filed a semi-monthly estimate in order to obtain a periodic payment. You enclosed with your request a letter from the surety on the bond of the original contractor in which it acknowledged its liability to those subcontractors of the original general contractor who established valid liens under G. L. c. 149, § 29.

General Laws c. 30, § 39G, requires the contracting authority to retain sums sufficient to satisfy outstanding claims and properly filed liens when making final or semi-final payments. The provisions referred to are expressly applicable only to payments against final or semi-final estimates, and unless by necessary implication, they have no application to payments against semi-monthly estimates. The effect of G. L. c. 30, § 39G, is to prevent the general contractor from receiving the final payment until he has disposed of the claims of his suppliers and subcontractors. General Laws c. 30, § 39F, on the other hand, contemplates payments against periodic estimates to general contractors out of which the general contractor shall pay his subcontractors; it does not prohibit, by implication, such payments when statutory liens exceed the usual retainage. Thus, the department may protect subcontractors, who have completed their work and filed liens, by withholding payments against periodic estimates in an amount sufficient to cover the statutory liens, or, in the exercise of its sound discretion, it may pay the general contractor in the expectation that he will satisfy the claims of his present subcontractors out of available funds and, thereby, eliminate the need for further liens being filed against the contract.

In view of your receipt of the letter referred to above from the surety on the bond of the original contractor, it is my opinion that in the instant situation, you would be justified in making payments against periodic estimates to the completing contractor.

You have suggested that G. L. c. 149, § 29, may complicate payment to contractors against periodic estimates when statutory liens have been filed in amounts greater than the usual retainage. General Laws c. 149, § 29, requires the awarding authority to obtain security in the form of a bond only; it does not impose an obligation on the department to retain any additional security for the benefit of subcontractors.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By WILLIAM D. QUIGLEY,
Assistant Attorney General.

A loan by a domestic mutual life insurance company to a domestic mutual fire insurance company, the companies having common directors and officers, loan to be used by the fire company to purchase, with others, the stock of a foreign casualty company, would not violate the laws of the Commonwealth where there is no evidence that an evasion of the prohibition of investment of the funds of a domestic life company in the stock of other insurance companies was intended.

Aug. 4, 1961.

Hon. Otis M. Whitney, *Commissioner of Insurance.*

Dear Sir: — You have requested an opinion with respect to the following:

A domestic mutual life insurance company contemplates the making of a direct placement loan to a domestic fire insurance company, which, you state has a full casualty charter. The domestic fire company intends to utilize the proceeds of the loan to purchase the corporate stock of a foreign casualty company. The fire company has interested other corporate investors who intend to purchase stock of the same foreign casualty company provided that loans are made to them by the domestic mutual life company for such purpose.

You further state that the stock of the foreign casualty company to be acquired by the domestic fire company and other corporate investors is to be placed in a voting trust for a term of not more than ten years and that the domestic fire company may purchase options from the other corporate investors to acquire their stock interests in the foreign casualty company at a price to be mutually agreed upon by the parties.

You indicate that the domestic life company and the domestic fire company have some directors and officers in common, and that if the loans and stock purchases are consummated, the stockholders of the foreign casualty company may elect some of these men as officers and directors and that the home offices of the foreign insurance company will be moved into the Commonwealth.

In view of the magnitude of the above proposed loans, you state your determination to give your approval or disapproval at the present time rather than after the next regular triennial examination.

You ask specifically for my advice as to whether or not the above proposed loans would constitute a violation of the laws of the Commonwealth.

A letter supplementary to your request and the correspondence attached thereto indicate that the domestic life company has committed itself (to the domestic fire company) to the making of a one million dollar loan for a term of fifteen years at five per cent interest payable semi-annually, without collateral, provided the net worth of the fire company, including special surplus funds, is maintained at four times the amount of the loan. It further appears that the loan to the fire company is to be consummated on or before July 26, 1961.

General Laws c. 175, § 63, deals with the payment and investment of capital and reserve of domestic companies.

Section 63, as most recently amended by St. 1959, c. 128, provides that:

The capital of any domestic company, other than life, and three fourths of the reserve of any domestic stock or mutual life company, shall be invested only as follows:

"14A". In the bonds, notes or other evidences of indebtedness of companies incorporated under the laws of the United States, or any state

thereof, or of the Dominion of Canada or any province thereof or of associations or trusts as defined in section one of chapter one hundred and eighty-two, the average net earnings of the issuing company or such association or trust, as the case may be, during the seven fiscal years next preceding the date of investment having been not less than four times the fixed charges, provided, however, that no more than one half of the capital of any domestic company, other than life, and not more than one half of the reserve of any domestic stock or mutual life company may be invested under this paragraph . . .

"15. In loans accrued by collateral security consisting of any of the above."

In view of the above provisions, it would appear that the domestic life company can invest funds in the notes of the domestic fire company, which is incorporated in the Commonwealth, provided that the financial condition and history of the domestic fire company is such as to come within the provisions of paragraph 14A and provided that the loan itself is otherwise in accordance with the provisions of said paragraph. By inference from paragraph 15, such loan under paragraph 14A is made without collateral (*i.e.* direct placement). In view of the fact that you have not given me specific facts concerning the financial condition and history of the domestic fire company or the other corporate investors, I can only state that such loan or loans must qualify under paragraph 14A or other provision of law. In the event, as your letter indicates, that the loan is to be made under the provisions of the second paragraph of § 66, from funds not required to be invested under the provisions of § 63, § 66 does not prohibit the taking of such stock as collateral for an otherwise permissive loan. In fact, § 66 contemplates such a possibility and provides that:

". . . and nothing in this section or section sixty-three shall prevent any such life company from acquiring or holding any property acquired in satisfaction of any debt previously contracted, or that shall be obtained by sale or foreclosure of any security held by it; provided, that if the property owned be such as is prohibited for investment by such company, it shall dispose of such property, if personal, within one year, and if real estate, within five years, from the date when it acquired title to the same, unless the commissioner shall extend the time for such disposition for the reason that the interests of the company will suffer materially by a forced sale of such property."

General Laws c. 175, § 66, as amended by St. 1954, c. 111, § 2, also provides as follows:

"Except as otherwise provided, no domestic life company shall invest any of its funds in any unincorporated business or enterprise, or in the stocks or evidence of indebtedness of any corporation, the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes, nor shall such life company invest any of its funds in its own stock or in the stock of any other insurance company. . . ."

The above-quoted provision of § 66 prohibits the domestic life company from investing any of its funds in the stock of any other insurance company. However, there is no express statutory provision which prevents a domestic life company from making a loan to a domestic fire company, with which it shares some officers and directors in common, for the purpose of pur-

chasing stock of a casualty company. No facts have been presented to me, nor may I assume, without justification, that the life company will utilize the fire company as a mere tool or agent to evade the express prohibition of § 66. In the absence of such evidence, I am bound to assume that the mandate of the statute will be respected. Should such evidence exist or later be brought to light, your supervisory powers under the provisions of the Insurance Law, c. 175, are sufficiently broad to enable you to take appropriate action.

You have indicated that the domestic life company and the domestic fire company have certain directors and officers in common and that some of these will, at some future date, become officers or directors of the foreign casualty company. General Laws c. 175, § 193C, inserted by St. 1948, c. 617, provides that:

"Any domestic insurance company may have as a director a person who is also a director of another insurance company, which may be an alien, foreign or domestic company, provided, however, that if the effect thereof is to substantially lessen competition generally in the insurance business or tends to create a monopoly therein, it shall be deemed a violation of this chapter. . . ."

Because of statutory limitations, the domestic life company and the domestic fire company are not in competition in the insurance business and, I can assume, have had separate and distinct existences, purposes and ownership. As a general rule, our courts recognize separate corporate existences except in the case of perpetrating a fraud, evading a statute, or committing a crime. You have furnished me with no facts or evidence to indicate that the effect of the loans and the purchase of stock will be to "substantially lessen competition generally in the insurance business or tends to create a monopoly therein. . . ." If you possess such evidence, it would constitute a sufficient reason for you to disapprove the loans. If such evidence should later appear, you can act under the provisions of § 193C to restrain such violation promptly.

Accordingly, I must advise you on the basis of the information which you have furnished to me that the loan from the domestic mutual life company to the domestic fire company does not appear to violate the laws of the Commonwealth.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Leo Sontag, *Assistant Attorney General.*

The State Treasurer may not withhold payment of the retirement allowance of a retired State employee appointed a member of the Metropolitan Transit Authority; statutory prohibition being of payment for services rendered by retired persons to certain public bodies; view expressed that Authority was not one of the bodies included.

Aug. 9, 1961.

Hon. John T. Driscoll, *Chairman, State Board of Retirement.*

Dear Sir: — You have written me stating that a person has since March 30, 1957, been receiving a retirement allowance from the Commonwealth, which I assume is a contributory retirement allowance, and that on July 20, 1961, he qualified as Chairman of the Board of Trustees of the Metropolitan Transit Authority, having been appointed by His Excellency the Governor. You further state that as of July 28th the Comptroller has requested the State Treasurer to withhold the payment of any further retirement allowance checks to the person referred to, and under those circumstances you request an opinion upon the following questions:

"1. What is the duty and the responsibility of the State Board of Retirement with regard to including Mr. Tyler on the monthly warrant for retirement allowance payment?

2. What is the duty and the responsibility of the State Treasurer with regard to the payment of such retirement allowance to Mr. Tyler?"

General Laws c. 32, § 91, provides that "No person while receiving a pension or retirement allowance from the commonwealth or from any county, city or town, shall, after the date of his retirement be paid for any service rendered to the commonwealth or any county, city, town or district . . ." with certain exceptions.

Except in one instance (and that is not the applicable situation here), the provisions of G. L. c. 32, § 91, do not operate to suspend the payment of the pension of a retired person who holds either permitted or non-permitted re-employment. The retired person continues in receipt of his pension, only the compensation for his other employment being affected.

Under the provisions of the Civil Defense Act, permitting the re-employment in the public service of retired public employees, and providing for the deduction of the amount of the retirement allowance or pension from the compensation for the services rendered in the re-employment (St. 1950, c. 639, § 9(*h*)), the retired person also continues in receipt of his pension, only the compensation for his other services being affected.

Since, therefore, the person you refer to is entitled to the payment of his retirement allowance, in any event, and it is only the payment of the retirement allowance that comes before you in your official capacity, in accordance with the long established policy of this office to render opinions only on those aspects of any matters presented for opinions which concern the legal duties of the requesting official, I advise you that, as stated, there can be no legal objection to the payment of the retirement allowance of the person referred to in your request.

The question of the extent of the authority, under the provisions of the Civil Defense Act referred to or of G. L. c. 32, § 91, of the Metropolitan Transit Authority to pay for services rendered by a retired State employee is one which cannot come before you in the performance of your official duties.

It is to be noted, however, that the general prohibition contained in G. L. c. 32, § 91, against re-employment of retired persons, even without the exceptions stated therein, is not a broad prohibition against the payment of a retired person for services rendered in *any* public employment. The Legislature in the prohibition referred to explicitly enumerates with some care the governmental entities which may not pay for the services of former public servants receiving pensions from the Commonwealth, and specifically enumerates, only "the commonwealth, or any county, city, town or district . . ." Public authorities such as the Metropolitan Transit Authority, which was created by the provisions of St. 1947, c. 544, with officers, agents, employees and a treasury of its own, are not specifically included, and it is a general rule of statutory construction that *expressio unius est exclusio alterius*. That is to say, the express mention of one matter in a statute excludes by implication other similar matters not mentioned. It is well established by the decisions of our Supreme Judicial Court that, as was said in the decision in *Morse* v. *Boston*, 253 Mass. 247, 252, "Statutes must be interpreted as enacted. Omissions cannot be supplied . . ." The expediency of the enactment of the statutory provisions referred to, and the wisdom of the provisions, were for the Legislature to determine. See *Howe Brothers Company* v. *Unemployment Compensation Commission*, 296 Mass. 275, 283.

The foregoing, I believe, answers both your questions.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Chairman of the Board of Trustees of the Metropolitan Transit Authority is not eligible for membership in the Contributory Retirement System for State Employees.

AUG. 11, 1961.

HON. JOHN T. DRISCOLL, *Chairman, State Board of Retirement.*

DEAR SIR: — From your letter of recent date I understand that your board is in receipt of an application from the then Chairman of the Board of Trustees of the Metropolitan Transit Authority, for membership in the State Employees' Retirement System.

You state that the person referred to was a member of the Retirement System from 1949 to 1953 when he was serving as Assistant Secretary to the Governor. You further state that immediately on terminating his service in the Governor's office, he served as a member of the Industrial Accident Board and continued in that position until 1957. During this service, also, he was a member of the retirement system. You further advise that at the time of the filing of his application he was serving as Chairman of the Board of Trustees of the Metropolitan Transit Authority under an appointment by the Governor, with the advice and consent of the Council.

You now request an opinion,

"as to whether service as a member and chairman of the Board of Trustees of the Metropolitan Transit Authority can be considered as employment by the Commonwealth which would make him eligible for membership in the State Employees' Retirement System."

In 1945 the General Court, by c. 658 of the Acts and Resolves of that year, consolidated the various public contributory retirement systems. Section 2 of G. L. c. 32, inserted by c. 658, describes the various public contributory retirement systems. Section 1 contains many definitions of various terms used in §§ 1 to 28, inclusive, of c. 32, inserted by c. 658. "Employee" is defined in some detail. "Governmental unit" is also so described. "Member," "membership service," "political subdivision," "regular compensation," "service" and "system" are defined also. Section 3 of c. 32 deals with the subjects of membership and eligibility for membership, late entry into membership and other privileges, credit for service, leave of absence and reinstatement into active service, dual membership, and transfer of re-establishment of membership.

Without, at this time, going into great detail, it is clear to me that the first qualification for membership under G. L. c. 32, §§ 1 to 28, inclusive, relating to the public contributory retirement systems, is that the applicant is paid regular compensation by one of the political entities subject to the sections. The word "member" as defined in § 1 includes any employee included in the State Employees' Retirement System. The words "membership service" are defined as service as an employee in any governmental unit. "Political subdivision" is defined as the Metropolitan District Commission or any county, hospital district, city, town, district or housing authority established under the provisions of § 26L of c. 121 or other public unit in the Commonwealth. "Governmental unit" is defined as the Commonwealth or any political subdivision thereof. The definition of the word "employee" covers over half a page. The word "employee" as applied to persons whose regular compensation is paid by any political subdivision of the Commonwealth, except the Metropolitan District Commission, shall mean any person who is regularly employed in the service of any such political subdivision. "Employee" as applied to persons whose regular compensation is paid by the Commonwealth or the Metropolitan District Commission shall mean any person, whether employed or appointed for a stated term, who is engaged in duties which require that his time be devoted to the service of such governmental unit and who is regularly and permanently employed in such service.

The applicant is not, in my opinion, an employee of the Commonwealth within the definition of the word "employee" in § 1 of c. 32. He is employed by and compensated by the Metropolitan Transit Authority, which is an independent governmental entity created by St. 1947, c. 544, with its own funds and its own treasury and its own property and its own liabilities. It has an existence apart and distinct from that of the Commonwealth. *Opinions of the Justices*, 334 Mass. 721, 734.

I am aware of the opinion of my predecessor to the effect that service as a public trustee of the Boston Elevated Railway Company might be construed as service for the Commonwealth in the computation of creditable service to justify the payment of a noncontributory veteran's pension under the provisions of G. L. c. 32, §§ 56–60, inclusive. Attorney General's Report, 1955, p. 80.

The situation in that case was quite different from the case at bar. The question before us is the right of the Chairman of the Board of Trustees

of the Metropolitan Transit Authority to become a member of the State Contributory Retirement System. In order to do that he must bring himself squarely within the provisions of §§ 1 to 28, inclusive, of c. 32. The fact, as stated above, that under St. 1947, c. 544, the Authority is a distinct entity, separate from the Commonwealth, distinguishes the status of the trustees of the Authority from that of the public trustees of the Boston Elevated Railway Company under St. 1918, c. 159. It was held under the latter act that it created a contract between the company and the Commonwealth, and that the Commonwealth itself had taken the company over as a public enterprise. *Opinion of the Justices*, 261 Mass. 556, 594; *Auditor of the Commonwealth* v. *Trustees of Boston Elevated Railway Co.*, 312 Mass. 74, 78. Under all the circumstances, I am constrained to rule that the Chairman of the Board of Trustees of the Metropolitan Transit Authority is not within the definition of "employee" as set forth in G. L. c. 32, § 1.

In this connection it is helpful to consider certain of the provisions of St. 1947, c. 544, which is entitled "AN ACT PROVIDING FOR THE CREATION OF THE METROPOLITAN TRANSIT AUTHORITY AND THE ACQUISITION AND OPERATION BY IT OF THE ENTIRE ASSETS, PROPERTY AND FRANCHISES OF THE BOSTON ELEVATED RAILWAY COMPANY." Section 18 of that act provides in substance that cc. 30 and 31 of the General Laws shall not apply to the officers of the Authority "nor shall chapter thirty-two of the General Laws apply to any retirement or pension system of the authority, but the trustees may continue payment of pensions and retirement allowances under and in accordance with the present pension plan and authorizations of the board of trustees of the company, as from time to time modified by the trustees." Obviously since membership in the State Employees' Retirement System depends upon eligibility and qualifications found only in G. L. c. 32, and in view of the express provisions of § 18 of c. 544 that c. 32 of the General Laws shall not apply to any retirement or pension system of the Authority, the answer to your question, in my opinion, is in the negative.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Application of "Administrative Procedure Act", to State agencies and schedule of agencies in their relation thereto.

AUG. 14, 1961.

HON. CHARLES GIBBONS, *Commissioner of Administration.*

DEAR SIR: — Your predecessor in office, Hon. Charles Francis Mahoney, requested an opinion as to which of the agencies of State government do, and which do not, come within the purview of G. L. c. 30A, the State Administrative Procedure Act.

Before such an opinion is ventured, it should be clearly understood what purposes can be served by such a listing and what its limitations are.

The act, in par. (2) of § 1, defines "Agency" as including:

". . . any department, board, commission, division or authority of the state government, or subdivision of any of the foregoing, or official of the state government, authorized by law to make regulations or to conduct adjudicatory proceedings, but does not include the following: the legislative and judicial departments; the governor and council; military or naval boards, commissions or officials; the department of correction; the youth service board and the division of youth service in the department of education; the parole board; the division of industrial accidents of the department of labor and industries; the division of child guardianship of the department of public welfare; and the division of civil service."

Thus, it is possible to list a certain number of agencies which are wholly and expressly excluded from the operation of the act. It does not follow, however, that all other agencies of State government are subject to the act. They are within its coverage only if they are "authorized by law to make regulations or to conduct adjudicatory proceedings."

Both of these terms are defined in the act. "Regulation" is defined in par. (5) of § 1 to include:

". . . the whole or any part of every rule, regulation, standard or other requirement of general application and future effect adopted by an agency to implement or interpret the law enforced or administered by it, but does not include (*a*) advisory rulings issued under section eight; or (*b*) regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not directly affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities; or (*c*) regulations concerning the operation and management of state penal, correctional, welfare, educational, public health and mental health institutions and soldiers' homes, or the development and management of property of the commonwealth or of the agency; or (*d*) regulations relating to the use of public works, including streets and highways, when the substance of such regulations is indicated to the public by means of signs or signals; or (*e*) decisions issued in adjudicatory proceedings."

"Adjudicatory proceeding" is defined in par. (1) of § 1, to mean:

". . . a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing. Without enlarging the scope of this definition, adjudicatory proceeding does not include (*a*) proceedings solely to determine whether the agency shall institute or recommend institution of proceedings in a court; or (*b*) proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes; or (*c*) proceedings for the disposition of grievances of employees of the commonwealth; or (*d*) proceedings to classify or reclassify, or to allocate or reallocate, appointive offices and positions in the government of the commonwealth.

The preparation of the list you request thus requires that we identify those agencies which, though not excluded expressly by name or designation in par. (2) of § 1, are nevertheless not even potentially subject to the act because they have no authority "to make regulations or to conduct adjudicatory proceedings," as those terms are defined in the act. It becomes necessary, in other words, to interpret these two terms, since they are the two principal criteria by which the coverage of the act is determined.

The central importance of these two criteria creates at least three prob-

lems in the preparation of the list of agencies covered by the act, of which note should be taken by anyone using the list. These problems are:

1. The difficulties of compiling a list.
2. The impermanence of the list.
3. The partial value of the list.

Let me develop further what I mean by these problems.

(1) *The difficulties of compiling a list.* — The preparation of the list requires, first, a most careful search of the General Laws to determine the functions of each agency, and more particularly to see whether it is empowered to issue statements that are arguably "regulations" or to conduct proceedings that are arguably "adjudicatory." There is inevitably the danger of inadvertence in a search of so vast an expanse of detailed material. Thus, an agency may be thought not to be included under the act, simply because its power to determine some individual's rights "after hearing" is buried in some complex statutory provision and goes unnoticed.

In addition to the magnitude of the clerical check, there are serious problems of statutory interpretation.

Whether a particular statement of policy by an agency is a "regulation" may at times be difficult to determine. The comprehensive definition of "regulation" quoted above should not present many difficulties of subject matter, but it does pose questions in terms of the degree of formality with which the agency acts. A statement of agency policy made by a department head or commission chairman in an after-dinner speech should not be regarded as a "regulation." Circular letters or bulletins, issued regularly to those regulated occupy a more ambiguous status, and the determination whether they are "regulations" may depend on the care and exactness with which they are drawn, and the sanctions to be anticipated for non-compliance.

It is obviously impossible, in the preparation of a list of agencies, to make a close examination of the day-to-day practice of each agency to see with what degree of formality it issues policy statements. All that can be done is to determine whether the agency has the power to issue statements with such formality and carrying such sanctions that they should be regarded as "regulation." Listing an agency obviously may not prevent it from issuing informal statements outside the act.

The principal interpretive problem relating to "adjudicatory proceedings" arises from the provision that a proceeding is adjudicatory if a hearing is required by "constitutional right." What in a given instance comprises a constitutional right to a hearing can be one of the most baffling questions of constitutional law, determinable only after a meticulous factual analysis of the particular case at hand. It seems clear that a general listing of agencies subject to the act must be based on the provision that a hearing is adjudicatory if it is required by "any provision of the General Laws." This will in fact cover most of the instances where a constitutional right may also be asserted. But a footnoted caveat must be added to the list, to the effect that a proceeding is adjudicatory if there is a constitutional right to a hearing, even though the General Laws may make no provision for it.

(2) *The Impermanence of the List.* — Any list of agencies will be outdated by subsequent enactments of the Legislature, even though the Administrative Procedure Act is not itself amended. An agency not in-

cluded in the list may subsequently be given new authority by the Legislature to issue regulations or to conduct adjudicatory proceedings. Conversely, an agency that has such authority at the time the list is prepared may later be deprived of it by the Legislature. In addition, new agencies may be created by the Legislature with an authority that brings them under the act.

(3) *The Partial Value of the List.* — An agency is in effect subject to the act only in so far as it does in fact issue regulations or conduct adjudicatory proceedings. Its authority to do these things brings it within the definition of "agency" in par. (2) of § 1, but the other provisions of the act impinge on the agency only to the extent that it exercises that authority.

It follows from this that a listing of agencies subject to the act tells us that these agencies must conform to its provisions *if* and *when* they issue regulations or conduct adjudicatory proceedings, and not otherwise. The very same agency may issue one statement of policy that comes within the act's definition of "regulation" and may issue another statement that does not. If so, it must conform to the act only with respect to the former statement. Similarly, an agency may in one month conduct a proceeding that comes within the act's definition of an "adjudicatory proceeding," and in the next month the agency may conduct a proceeding that does not. Again, the agency must conform to the requirements of the act only with respect to the former proceedings.

Since the requested listing of agencies subject to the act must include all agencies "authorized by law to make regulations or to conduct adjudicatory proceedings," anyone who uses the list must understand what the list signifies. It includes all agencies potentially subject to the act as of a given time. But it does not tell the reader which of the activities of the agency are subject to the act and which are not.

Appended hereto, then, is a consolidated schedule, to which is attached an alphabetical index, classifying the State agencies in terms of their obligations to comply with the Administrative Procedure Act in respect to their regulation-making powers and their adjudicatory powers. Those agencies created by the General Laws are listed first in the order in which they appear in the statute book, followed by those agencies created by special acts. The relation of each agency to the act is indicated by the symbols "R2," "R3," "R9," and "A" respectively.

"R2" refers to regulations governed by § 2 of the act, which reads in part:

"Prior to the adoption or amendment of any regulation as to which a hearing is required by any law, or any other regulation the violation of which is punishable by fine or imprisonment except a regulation of agency practice or procedure, an agency shall give notice and hold a public hearing, as follows:

"(1) The agency shall, within the time specified by any law, or, if no time is specified, then at least twenty-one days prior to the public hearing, (*a*) publish notice of such hearing in such manner as is specified by any law, or, if no manner is specified, then in such newspapers, and, where appropriate, in such trade, industry or professional publications as the agency may select; and (*b*) notify any person specified by any law, and, in addition, any person or group filing written request, such request to be renewed yearly in December, for notice of hearings which may affect that person or group, notification being by mail or otherwise to the last address specified by the person or group.

"R3" refers to regulations governed by § 3 of the act, which reads:

"Prior to the adoption or amendment of any regulation other than those subject to section two, or the repeal of any regulation, an agency shall give notice and afford interested persons an opportunity to present data, views or arguments, as follows:

"(1) The agency shall, within the time specified by any law, or if no time is specified, then at least twenty-one days prior to its proposed action (*a*) publish notice of its proposed action in such manner as is specified by any law, or if no manner is specified then in such newspapers, and, where appropriate, in such trade, industry or professional publications as the agency may select; and (*b*) notify any person specified by any law, and, in addition, any person or group filing written request, such request to be renewed yearly in December, for notice of proposed action which may affect that person or group, notification being by mail or otherwise to the last address specified by the person or group.

"The notice shall (*a*) refer to the statutory authority under which the action is proposed; (*b*) give the time and place of any public hearing, or state the manner in which data, views or arguments may be submitted to the agency by any interested person; (*c*) either state the express terms or describe the substance of the proposed action, or state the subjects and issues involved; and (*d*) include any additional matter required by any law.

"(2) The agency shall afford interested persons an opportunity to present data, views or arguments in regard to the proposed action orally or in writing. If the agency finds that oral presentation is unnecessary or impracticable, it may require that presentation be made in writing.

"(3) If the agency finds that the requirements of notice and opportunity to present views on its proposed action are unnecessary, impracticable or contrary to the public interest, the agency may dispense with such requirements or any part thereof. The agency's finding and a brief statement of the reasons for its finding shall be incorporated in the regulation, amendment or repeal as filed with the state secretary under section thirty-seven of chapter thirty.

"This section does not relieve any agency from compliance with any law requiring that its regulations be approved by designated persons or bodies before they may become effective."

"R9" refers to regulations within § 9 of the act. This section deals with regulations governing hearings on the adoption, amendment, or repeal of regulations as well as adjudicatory hearings. Section 9 reads:

"Each agency shall adopt regulations governing the procedures prescribed by this chapter."

"A" refers to par. 1, § 1, of the act relating to adjudicatory proceedings, the text of which is set out above.

I am assuming for purposes of this opinion that *every* agency must comply with § 9 if it is subject to the act in any respect, other than in respect to § 11A, the so-called "Open Meeting" Law. The provisions of section 11A as to notice of meetings, records, publications, etc., apply to a number of agencies which are otherwise exempt from c. 30A, and hence I am explicitly excluding that section from the purview of this opinion.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

Schedules of the Agencies of Government of the Commonwealth of Massachusetts in Their Relation to the State Administrative Procedure Act.

Note — The symbols below indicate the obligation of the agencies to comply in terms of their respective regulation-making powers or adjudicatory powers or both.

"R2" refers to § 2 of the act governing the adoption and amendment of regulations as to which a hearing is mandatory or whose violation invites criminal sanctions.

"R3" refers to § 3 of the act governing both the adoption or amendment of all regulations not covered by § 2 and the repeal of any regulations; it also prescribes the procedure for holding hearings or other public exchanges pursuant to such adoption, amendment or repeal.

"R9" refers to § 9 of the act, which deals with regulations governing hearings on the adoption, amendment or repeal of regulations as well as adjudicatory hearings.

"A" refers to par. (1), § 1, of the act relating to adjudicatory proceedings.

G. L. c. 6: The Governor, Lieutenant Governor and Council, Certain Officers under the Governor and Council, and State Library.

1. Armory Commission (*G. L. c. 6*, §§ 17, 18)	—	—	—	—
2. Art Commission (*G. L. c. 6*, §§ 17, 19, 20)	—	—	—	—
3. Commissioner of Veterans' Services (*G. L. c. 6*, §§ 17–25; c. 115, §§ 2, 15)	—	R3	R9	A
4. Commissioners of Uniform State Laws (*G. L. c. 6*, §§ 17, 26–28)	—	—	—	—
5. Public Bequest Commission (*G. L. c. 6*, § 17, 28 A-D	—	—	—	—
6. State Ballot Law Commission (*G. L. c. 6*, §§ 17, 29–32; *c. 53*, § 12, 22A; *c. 54*, § 37)	—	R3	R9	A
7. Milk Regulation Board (*G. L. c. 6*, §§ 17, 42; *c. 94*, §§ 12A, 13, 13A, 16J	R2	R3	R9	—
8. Alcoholic Beverages Control Commission (*G. L. c. 6*, §§ 17, 43–45; *c. 138*, §§ 12, 15A, 18, 18B, 19–25C, 64, 67, 77)	R2	R3	R9	A
9. State Racing Commission (*G. L. c. 6*, §§ 17, 48; *c. 128A*, §§ 3, 9, 11)	R2	R3	R9	A
10. Massachusetts Commission Against Discrimination (*G. L. c. 6*, §§ 17, 56; *c. 151B*, §§ 3-(5), 5; *c. 151C*, §§ 3, 5)	R2	R3	R9	A
11. Massachusetts Aeronautics Commission (*G. L. c. 6*, §§ 17, 53–59; *c. 90*, §§ 39, 44, 49B-R)	R2	R3	R9	A
12. State Housing Board (*G. L. c. 6*, §§ 17, 64; *c. 121*, §§ 26U, 21AA, 21KK; *c. 121A*, § 4)	—	R3	R9	A
13. Youth Service Board (*G. L. c. 6*, §§ 65–69B)	—	—	—	—
14. Weather Amendment Board (*G. L. c. 6*, §§ 17, 72)	—	—	R9	A
15. Council for the Aging (*G. L. c. 6*, §§ 17, 73–84)	—	—	—	—
16. Massachusetts Commission on Atomic Energy (*G. L. c. 6*, §§ 17, 85–93)	—	—	—	—
17. Finance Advisory Board (*G. L. c. 6*, §§ 17, 97, 98)	—	—	—	—
18. Boxer's Fund Board (*G. L. c. 6*, §§ 17, 99)	—	—	—	—

19. Medical, Dental and Nursing Scholarship Board (*G.* L. c. 6, §§ 17, 100)	—	—	—	—

G. L. c. 7 Commission on Administration and Finance

Note — Most of the activities of this commission relate to the Commonwealth's internal management or to matters expressly exempted from the operation of the Administrative Procedure Act. In four cases, however, the commission, acting either directly or through its subordinates, the state purchasing agent, the director of building construction, the director of hospital costs and finances, or the state employers' group insurance commission, may make regulations subject to Section 3.

State purchases (G. L. c. 7, § 22)	—	R3	R9	—
Building construction (G. L. c. 7, § 30I)	—	R3	R9	—
Hospital Costs and Finances (G. L. c. 7, §§ 30K, L)	—	R3	R9	—
State Employees' Group Insurance (G. L. c. 32A, §§ 3, 11)	—	R3	R9	—

G. L. c. 9 — Department of the State Secretary

1. The State Secretary (G. L. c. 110, § 9)	—	R3	R9	—

G. L. c. 10 — Department of the State Treasurer

1. State Board of Retirement (G. L. c. 10, §§ 18–20; c. 32, §§ 3–6a, 4–2, 5, 9–3, 16–1A, B, *c. 118C*, §§ 4, 7)	—	R3	R9	A

G. L. c. 12 — Department of the Attorney General

1. Director of Public Charities (G. L. c. 12, §§ 8C, 8I)	—	R3	R9	—

G. L. c. 13 — Department of Civil Service and Registration

1. Civil Service Commission	—	—	—	—
2. Director of Registration (G. L. c. 13, § 9A)	—	R3	R9	—

Note: In order to appreciate the significance of the Administrative Procedure Act to this department it is necessary to note the following extracts from the General Laws:

G. L. c. 13, § 1 — "There shall be a department of civil service and registration, which shall consist of a division of civil service and a division of registration. . . ."
(*Note:* The division of civil service has been expressly exempted from the operation of the Administrative Procedure Act.)

G. L. c. 13, § 8 — "The division of registration shall be under the supervision of a director, to be known as the director of registration, at such salary, not exceeding six thousand dollars, as the governor and council may determine. . . ."

G. L. c. 13, § 9 — "The various boards of registration and examination hereafter mentioned in this chapter shall serve in the division of registration and shall establish their offices in the state house within the spaces already or hereafter assigned to the director of registration."

G. L. c. 13, § 9A — "The director of registration, subject to the approval of the governor and council, may make such rules and regulations governing the conduct of written and oral examinations by the several boards of

registration and examination aforesaid as shall tend to standardize procedure and protect the commonwealth and applicants for registration against fraud; provided, that nothing in this section shall prevent any such board from adopting under authority of other provisions of law specific rules and regulations which are not in conflict with the rules and regulations authorized by this section."

G. L. c. 112, § 1 — "The director of registration shall supervise the work of the several boards of registration and examination included in the division of registration of the department of civil service and registration. He shall recommend changes in the methods of conducting examinations and transacting business, and shall make such reports to the governor and council as they may require or he may deem expedient."

The remaining sections of *G. L. c. 13* provide for the appointment of nineteen different boards of examination and registration. Seventeen of these boards have authority over one profession or occupation each. One has authority over two. Another has authority over three. Twenty-two professions and occupations altogether are thus subject to examination and registration by these boards.

The remaining sections of *G. L. c. 112* deal with the examination, registration, and regulation of twenty of these occupations. The order of treatment is not the same as in *G. L. c. 13*.

General Laws c. 141 deals with the examination, registration, and regulation of electricians.

General Laws c. 142 deals with the examination, registration, and regulation of plumbers.

General Laws cc. 13, 112, 141 and 142 — four chapters altogether — are thus devoted to the examination, licensing, registration, and regulation of twenty-two occupations and professions. The following schedule is arranged in the sequence dictated by *G. L. c. 13. G. L. c. 112, §§ 61–65, 87N* give each board authority to revoke registration for malpractice. Other references to *G. L. c. 112, 141, 142* are inserted under the particular boards of examination to which they relate.

3. Board of Registration in Medicine (G. L. c. 13, §§ 10–11)	R2	R3	R9	A
(a) Registration of Physicians and Surgeons (G. L. c. 112, §§ 2–9A)				
(b) Registration of Physical Therapists (G. L. c. 112, §§ 23A-M)				
4. Board of Registration in Chiropody (Podiatry) (G. L. c. 13, § 12A-C)	R2	R3	R9	A
(c) Registration of Chiropodists (G. L. c. 112, §§ 13–22)				
5. Board of Registration in Nursing (G. L. c. 13, §§ 13–15B–D)	R2	R3	R9	A
(d) Registration of Nurses (G. L. c. 112, §§ 74-81A-B)				
6. Board of Registration in Optometry (G. L. c. 13, §§ 16–18)	R2	R3	R9	A
(e) Registration of Optometrists (G. L. c. 112, §§ 68–70)				

7. Board of Dental Examiners (G. L. c. 13, §§ 19–21)	R2	R3	R9	A
(f) Registration of Dentists (G. L. c. 112, §§ 43–52A–C)				
8. Board of Registration in Pharmacy (G. L. c. 13, §§ 22–25)	R2	R3	R9	A
(g) Registration of Pharmacists (G. L. c. 112, §§ 24–30)				
(h) Licensing of wholesale druggists (G. L. c. 112, §§ 36A–D)				
(i) Registration and licensing of Stores for Transacting Retail Drug Business (G. L. c. 112, §§ 37–41A)				
9. Board of Registration in Veterinary Medicine (G. L. c. 13, §§ 26–28)	R2	R3	R9	A
(j) Registration of Veterinarians (G. L. c. 112, §§ 55–59)				
10. Board of Registration in Embalming and Funeral Directing (G. L. c. 13, §§ 29–31)	R2	R3	R9	A
(k) Registration of Embalmers and Funeral Directors (G. L. c. 112, §§ 83–87)				
11. State Examiners of Electricians (G. L. c. 13, § 32)	R2	R3	R9	A
(l) Supervision of Electricians (G. L. c. 141)				
12. Board of Registration of Certified Public Accountants (G. L. c. 13, §§ 33–35)	R2	R3	R9	A
(m) Registration of Certified Public Accountants (G. L. c. 112, §§ 87A–D)				
13. Board of State Examiners of Plumbers (G. L. c. 13, §§ 36–38)	R2	R3	R9	A
(n) Supervision of Plumbing (G. L. c. 142)				
14. Board of Registration of Barbers (G. L. c. 13, §§ 39–41)	R2	R3	R9	A
(o) Registration of Barbers (G. L. c. 112, §§ 87G–R)				
15. Board of Registration of Hairdressers (G. L. c. 13, §§ 42–43)	R2	R3	R9	A
(p) Registration of Hairdressers (G. L. c. 112, §§ 87A–H)				
16. Board of Registration of Architects (G. L. c. 13, § 44)	R2	R3	R9	A
(q) Registration of Architects (G. L. c. 112, §§ 60A–H)				
17. Board of Registration of Professional Engineers and Land Surveyors (G. L. c. 13, §§ 45–47)	R2	R3	R9	A
(r) Registration of Professional Engineers and Land Surveyors (G. L. c. 112, §§ 81E–T)				
18. Board of Registration of Dispensing Opticians (G. L. c. 13, §§ 48–50)	R2	R3	R9	A
(s) Registration of Dispensing Opticians (G. L. c. 112, §§ 73C–J)				

19. Board of Registration of Sanitarians (G. L. c. 13, §§ 51–53)	R2	R3	R9	A
(t) Registration of Sanitarians (G. L. c. 112, §§ 87MM–00)				
20. Board of Registration of Real Estate Brokers and Salesmen (G. L. c. 13, §§ 54–57)	R2	R3	R9	A
(u) Registration of Real Estate Brokers and Salesmen (G. L. c. 112, §§ 87RR–DDD)				
21. Board of Registration of Electrologists (G. L. c. 13)	R2	R3	R9	A
(v) Registration of Electrologists (G. L. c. 112, §§ 87EEE–MMM)				
G. L. c. 14 — Department of Corporations and Taxation				
1. State Tax Commission (G. L. c. 14, §§ 2, 4; *c. 62B*, §§ 2, 5, 13, 21; *c. 64A*, § 4; *c. 64B*. § 2; *c. 64C*, § 25; *c. 138*, §§ 20A, 21; *c. 200A*, § 10	R2	R3	R9	A
2. Director of Accounts (G. L. c. 14, § 1; c. 44, § 43; *c. 59*, § 23)	—	R3	R9	—
3. Commissioner of Corporations and Taxation (G. L. c. 14, § 2; *c. 58*, § 1; *c. 155*, § 9	—	R3	R9	A
4. Appellate Tax Board (G. L. c. 58A, §§ 1–13; *c. 121A*, § 10)	—	—	R9	A
G. L. c. 15 — Department of Education				
1. Board of Education (G. L. c. 15, § 1A; c. 71, §§ 38G, 66)	—	R3	R9	A
2. Commissioner of Education (G. L. c. 15, § 1B; *c. 93*, §§ 21A–D, 22; *c. 112*, § 24B)	R2	R3	R9	A
3. Board of Collegiate Authority (G. L. c. 15, § 3A; *c. 69*, §§ 30, 31)	—	—	R9	A
4. Board of Library Commissioners (G. L. c. 15, § 9; *c. 78*, §§ 20, 25, 29)	—	R3	R9	—
5. Director of the Division of the Blind (G. L. c. 15, § 13; c. 69, §§ 25 C, D)	R2	R3	R9	—
6. Teachers' Retirement Board (G. L. c. 15, §§ 16–18; *c. 32*, §§ 3–6–a, 4–2, 5, 9–3 16–1A, B; *c. 118C*, §§ 4, 7)	—	R3	R9	A
7. School Building Assistance Commission (Acts of 1948 c. 645, § 8)	—	R3	R9	—
G. L. c. 16 — Department of Public Works				
1. Commissioner and Associate Commissioners (*G.* L. c. 16, §§ 2, 4, 5A, 6; *c. 90*, § 31A; *c. 91*, §§ 27, *34*, 38, 60, 61)	R2	R3	R9	—
2. Registrar of Motor Vehicles (*G.* L. c. 16, §§ 5, 6; *c. 90*, §§ 2, 7A, 7C, 20, 22, 23, 31, 32G; *c. 90A*, § 16)	R2	R3	R9	A
3. Outdoor Advertising Board (*G.* L. c. 16, § 5D; *c. 93*, §§ 29–32)	—	R3	R9	A
4. Director of Division of Motor Boats (*G.* L. c. 16, § 12; c. 90B, § 11)	R2	R3	R9	A

G. L. c. 17 — Department of Public Health

Nearly all of the many sections relative to public health which confer

authority to make regulations or conduct adjudicatory proceedings confer this authority on "the department." The practical interpretation of this phrase seems to be governed by the following sections of the General Laws:

G. L. c. 17, § 1 — "There shall be a department of public health, consisting of a commissioner of public health and a public health council." *Sec. 3* — "The public health council shall consist of the commissioner, ex officio, and six appointive members, of whom three shall be physicians. . . ."

G. L. c. 111, § 2 — "The commissioner shall administer the laws relative to health and sanitation and the regulations for the consideration of the council . . ."

In view of these sections, all authority to make regulations and to conduct adjudicatory proceedings which is conferred by law on "the department" is deemed to be vested in the public health council.

1. Public Health Council (*G. L. c. 17*, §§ 1, 13; *c. 94*, §§ 6, 9F, 9L, 10B, GET, 12A, 41, 43, 48C, D, 65J, Q, 66, 124, 131, 139A, 146, 147, 147A, 160, 187, 187A, 192, 193, 270A, 305B, 305B, C; *c. 111*, §§ 2, 5, 5BCDE, 6, 8, 8A, 17, 21, 54, 55, 71, 72, 94H, 107, 111, 117, 128, 142, 142B, 143, 150A, 152, 160, 162, 184A; *c. 114*, §§ 9, 36; *c. 130*, § 76; *c. 155*, § 2B)	R2	R3	R9	A
2. Commissioner of Public Health (*G. L. c. 17*, §§ 1, 2; *c. 494*, §§ 2, 7; *c. 94*, § 198B; c. 94B, §§ 2, 18; *c. 130*, §§ 22, 76; *c. 131*, § 28; *c. 149*, § 142A)	R2	R3	R9	A
3. Director of the Division of Food and Drugs (*G. L. c. 17*, § 4; *c. 94*, § 73A)	R2	R3	R9	—
4. Board of Review — Aquatic Nuisances (G. L. c. 111, § 5E)	—	—	R9	A
5. Board of Review — Hospitals and Sanitoria (G. L. c. 111, § 71)	—	—	R9	A
G. L. c. 18 — Department of Public Welfare				
1. Department of Public Welfare (G. L. c. 117, § 46; *c. 118*, §§ 4A, 5, 8; c. 118A, §§ 1, 3, 6A, 10, 18, 19, 20, 21; c. *118D*, §§ 9, 15; *c. 119*, §§ 5, 12, 18, 21, 37; *c. 180*, § 6	—	R3	R9	A
2. Division of Urban and Industrial Renewal (G. L. c. 121, § 26DDD)	—	R3	R9	—
G. L. c. 19 — Department of Mental Health (G. L. c. 123, § 33)	—	—	R9	A
G. L. c. 20 — Department of Agriculture				
1. Commissioner of Agriculture (*G. L. c. 20*, §§ 1–3; *c. 94*, §§ 16K, 42A, 42H, 90B, 106, 107, 117, AEIJ, 139E, 152A; *c. 128*, §§ 10, 25, 32)	R2	R3	R9	A
2. Director, Division of Dairying and Animal Husbandry (*G. L. c. 20*, § 6; *c. 94*, §§ 16DFG)	—	—	R9	A
3. Director, Division of Livestock Disease Control (*G. L. c. 20*, § 6; *c. 129*, §§ 2, 14B, 26A, 33, 33B, 33C, 39, 43)	R2	R3	R9	A
4. Director, Division of Plant Pest Control and Fairs (*G. L. c. 20*, § 6; *c. 128*, §§ 18, 27, 29)	R2	R3	R9	A

5. Director, Massachusetts Agricultural Experiment Station (*G. L. c. 20,* § 6; *c. 94,* §§ 1, 28, 230, 235, 255, 256, 260, 2611J)	—	R3	R9	A
6. Milk Control Commission (*G. L. c. 20,* §§ 7–9; *c. 94A,* §§ 2, 5, 6, 7, 10, 11, 22)	R2	R3	R9	A
G. L. c. 21 — Department of Natural Resources				
1. Board of Natural Resources (G. L. c. 21, §§ 1, 2; *c. 131,* §§ 45A, 64, 65, 68, 80)	R2	R3	R9	—
2. Commissioner of Natural Resources (*G. L. c. 21,* §§ 1, 3; *c. 132,* §§ 11, 17, 41)	R2	R3	R9	A
3. Director, Division of Marine Fisheries (*G. L. c. 21,* §§ 1, 3; *c. 130,* §§ 46, 70, 75, 76, 77, 80, 89, 94)	R2	R3	R9	A
4. Director, Division of Fisheries and Game (*G. L. c. 21,* §§ 1, 3, 7F; *c. 131,* §§ 2, 37, 41A, 48, 59, 62, 63, 66, 81, 87, 92, 103–111)	R2	R3	R9	A
5. Water Resources Commission (G. L. c. 21, §§ 8–15)	—	R3	R9	—
G. L. c. 22 — Department of Public Safety				
1. Commissioner of Public Safety (*G. L. c. 22,* § 1, 3; *c. 48,* § 87; *c. 102,* § 15; *c. 136,* §§ 4, 4A; *c. 140,* §§ 180G, 185 A-E; *c. 143,* §§ 15A, 34, 38, 54, 73, 81, 82, 85, 86; *c. 146,* § 63; *c. 147,* §§ 5, 25, 27, 37; *c. 148,* § 10)	R2	R3	R9	A
2. State Fire Marshal (*G. L. c. 22,* § 3; *c. 148,* § 13)	—	—	R9	A
3. Board of Boiler Rules (*G. L. c. 22,* § 10; *c. 146,* §§ 2, 3, 35, 43)	R2	R3	R9	—
4. Boards of Appeal on Licenses to Act as Engineer, Fireman, or Operator of Hoisting Machinery (G. L. c. 146, § 66)	—	—	R9	A
5. Board of Elevator Regulations (*G. L. c. 22,* § 11; *c. 143,* §§ 68, 69, 70, 71C)	R2	R3	R9	A
6. Board of Elevator Appeals (*G. L. c. 22,* § 11A; *c. 143,* § 70)	—	—	R9	A
7. Board of Schoolhouse Structural Standards (Acts 1955, c. 675; Acts of 1960, c. 596)	R2	R3	R9	—
8. State Boxing Commission (*G. L. c. 22,* § 12; *c. 147,* §§ 32, 35, 42, 46)	R2	R3	R9	A
9. Board of Standards (*G. L. c. 22,* § 13; *c. 143* §§ 3B, 21C)	R2	R3	R9	—
10. Board of Fire Prevention Regulations (*G. L. c. 22,* § 14; *c. 143,* §§ 3L, 9, 10, 13, 28, 38, 39A, 46)	Rs	R3	R9	—
G. L. c. 23 — Department of Labor and Industries				
1. Commissioner of Labor and Industries (*G. L. c. 23,* §§ 1, 3, 11J; *c. 98,* § 29; *c. 149,* §§ 1, 6, 8, 24G, 54, 63, 120A, 133, 142A-E, 145, 146, 147, 147A-E, 159A; *c. 150,* § 2; *c. 151,* § 11; *c. 152,* § 1)	R2	R3	R9	A

Note: G. L. c. 23, § *3* gives this official power to prepare ". . . all . . . rules and regulations which the department is authorized by law to make." This section is interpreted to mean only that, when the General Laws state that *The Department* shall have power to make rules, then the Commissioner has the power. The reason for

this is that the law too clearly puts power to make regulations in other bodies in The Department; see for example *c. 23*, § 90.

2. Director of Standards and Necessaries of Life (*G. L. c. 23*, § 8; c. 94, §§ 9, 182, 239A, 295IBK; *c. 95*, § 1; *c. 98*, §§ 13, 14A, 15, 18, 23, 28A, 29, 46A, 47; *c. 101*, §§ 25, 30)	R2	R3	R9	A
3. Director, Division of Employment Security (*G. L. c. 23*, § 91J; *c. 151A*, §§ 14 (k), 38)	—	R3	R9	A
4. Board of Review, Division of Employment Security (*G. L. c. 23*, § 9N(b); *c. 151A*, §§ 14, 40, 41)	—	—	R9	A
5. Labor Relations Commission (*G. L. c. 23*, § 90–R; *c. 150A*, §§ 5, 6, 6A)	—	R3	R9	A
6. Health, Welfare, and Retirement Trust Funds Board (*G. L. c. 23*, §§ 10A–C, *c. 151D*)	—	R3	R9	—
7. Director of Apprentice Training (G. L. c. 23, §§ 11E–L)	—	R3	R9	—
8. Industrial Accident Board (*G. L. c. 23*, §§ 14, 15; *c. 30A*, § 1 (2))	—	—	—	—
9. Industrial Accident Rehabilitation Board (*G. L. c. 23*, §§ 14, 24; *c. 30A*, § 1 (2))	—	—	—	—
10. Minimum Wage Commission (*G. L. c. 23*, § 1; *c. 149*, §§ 27, 27A; *c. 151*, §§ 5, 8, 19)	R2	R3	R9	—

G. L. c. 25 — Department of Public Utilities

1. Public Utilities Commission (G. L. c. 25, § 1)

Note: The functions of this commission are so varied and extensive, and the statutes under which it may act are so numerous, that it seems convenient to arrange the statutory citations under the different industries which are subject to regulation by the commission rather than to collect them in a single group.

A. *Aircraft* (*G. L. c. 90*, §§ 40HH, 44)	R2	R3	R9	A
B. Securities (Blue Sky Law) (G. L. c. 110A §§ 2, 3 (k), 4 (i) (j), 9, 12, 13)	R2	R3	R9	A
C. *Common Carriers* (*G. L. c. 159*, §§ 4, 4A, 16, 20, 21, 30, 31, 32, 33, 54, 58, 59, 65, 80, 81, 84)	—	R3	R9	A
D. *Carriers of Passengers by Motor Vehicle* (*G. L. c. 159A*, §§ 1, 3, 4, 7, 7A, 8, 9, 11A, 12; c. 159A, *App.* §§ 1–5)	R2	R3	R9	A
E. *Carriers of Property by Motor Vehicle* (*G. L. c. 159B*, §§ 3, 4, 6, 7, 8, 10B, 11, 11A, 12 15A, 16, 18, 20)	R2	R3	R9	A
F. *Railroads* (G. L. c. 160, §§ 21, 60, 102, 103, 104, 110, 113, 128A, 131, 131A, 134A, 137, 139, 141, 142, 147, 152, 213, 215)	—	—	R9	A
G. *Locomotive Boilers* (G. L. c. 160, § 168)	R2	R3	R9	—
H. *Street Railways* (*G. L. c. 161*, §§ 7, 27, 28, 38, 39, 40, 47, 48, 49, 53, 55, 58, 70, 71, 77, 85	R2	R3	R9	A
I. *Electric Railroads* (*G. L. c. 162*, §§ 9, 12, 13, 14)	R2	R3	R9	A

J. *Trackless Trolley Companies* (*G.* L. c. 163, §§ 1, 6, 12) — — R9 A

K. *Manufacture and Sale of Gas and Electricity* (G. L. c. 164, §§ 5, 15, 17A, 23, 30, 43, 47, 52, 54, 56D, 68, 70A, 72, 75BCE, 88, 92, 92A, 93, 94, 94F, 96, 97, 105A, 106, 109, 121, 122) R2 R3 R9 A

L. *Water and Aqueduct Companies* (G. L. c. 165, §§ 1, 4B, 5, 9, 10) — R3 R9 A

M. *Telephone and Telegraph Companies and Lines for the Transmission of Electricity* (G. L. c. 166, §§ 4, 11, 22A, 28)

2. Board of Gas Fitting Regulations (*G. L. c. 25*, § 12H) R2 R3 R9 A

G. L. c. 26 — Department of Banking and Insurance

1. Commissioner of Banks (*G. L. c. 26*, § 1; *c. 93*, §§ 24A; *c. 140*, §§ 96, 97, 101, 103; *c. 167*, §§ 2A, 6; *c. 167A*, § 5; *c. 168*, §§ 35 (11, 12), 36, 38, 56, 64; *c. 170*, §§ 11, 12, 24A, 42; *c. 171*, § 6; c. 172, §§ 14, 16, 47, 69, 70, 84; c. 172A, § 15; c. 255B, §§ 2, 3, 5, 7, 8) R2 R3 R9 A

2. Board of Bank Incorporation (*G. L. c. 26*, § 5; *c. 167A*, § 4; *c. 168*, § 73A, 78; *c. 170*, §§ 3, 49; c. 172A, § 2) — — R9 A

3. Small Loans Regulatory Board (*G. L. c. 26*, § 5A; c. 140, § 100) R2 R3 R9 —

4. Board for Removal of Bank Officers (*G. L. c. 167*, § 5) — — R9 A

5. Commissioner of Insurance (*G. L. c. 26*, § 1; *c. 152*, §§ 52, 52C–F, 60BG, 65GKL; *c. 174A*, § 2, 6–18; *c. 175*, §§ 25, 101B, 108, 113BFHI, 163, 166, 172A, 173, 174, 177B, 193D; *c. 175A*, §§ 6–19; c. 176, §§ 34, 35; c. 176A, §§ 6, 10, 25; *c. 176D*, §§ 6, 9; *c. 178*, § 7) R2 R3 R9 A

6. Board of Appeal on Fire Insurance Rates (*G. L. c. 26*, § 8. This section creates the board but does not assign it any functions, and no functions appear to be assigned to it anywhere else in the General Laws.)
(*G. L. c. 174A — Regulation of Rates for Fire, Marine and Inland Marine Insurance, and Rating Organizations* does not mention this board) — — — —

7. Board of Appeal on Motor Vehicle Liability Policies (*G. L. c. 26*, § 8A; *c. 90*, § 28; *c. 175*, § 113D. For rulings from which appeals may be taken see, among others, *c. 90*, §§ 3, 7E, 22, 26, 29, 32G; *c. 90A*, §§ 8, 9; *c. 159A*, § 11) — — R9 A

8. Board of Premium Instalment Rates for Brokers and Agents (*G. L. c. 175*, § 162B) R2 R3 R9 —

G. L. c. 28 — Metropolitan District Commission (G. L. c. 92, §§ 1, 38, 39, 74, 76A, 76B)	R2	R3	R9	A
G. L. c. 32, § 164 — Contributory Retirement Appeal Board	—	—	R9	A
G. L. c. 103, §§ 2, 3 — Commissioners of Pilots	—	R3	R9	A
G. L. c. 252, §§ 2, 5, 5A, 7 — State Reclamation Board	—	—	R9	A
Acts of 1899, c. 378, § 4 — Wachusett Mountain State Reservation Commission	R2	R3	R9	—
Acts of 1903, c. 264, § 3 — Mount Tom State Reservation Commission	R2	R3	R9	—
Acts of 1907, c. 540, § 3 — Deer Hill State Reservation Commission	R2	R3	R9	—
Acts of 1907, c. 541, § 3 — Mount Sugar Loaf State Reservation Commission	R2	R3	R9	—
Acts of 1908, c. 571, § 4 — Mount Everett Reservation Commission	R2	R3	R9	—
Acts of 1919, c. 327, § 5 — Purgatory Chasm State Reservation Commission	R2	R3	R9	—
Acts of 1922, c. 499, § 3 — Walden Pond State Reservation Commission	R2	R3	R9	—

Note: All the enabling statutes of the foregoing seven agencies except the last contain a section substantially as follows:

"Sec. — The commission shall have the same powers in acquiring land . . . which are given to the metropolitan park commission by chapter 407 of the Acts of 1893 and acts amendatory thereof, and shall be vested with full power and authority to care for, protect and maintain the same on behalf of the commonwealth."

Acts of 1893, c. 407 referred to in the foregoing contains the following section:

"*Section 4* — Said board shall have power to acquire, maintain, and make available to the inhabitants of said (metropolitan park) district open spaces for exercise and recreation; and to this end . . . shall be authorized to take, in fee or otherwise, in the name and for the benefit of the Commonwealth, by purchase, gift, devise or eminent domain, lands and rights in land for public open spaces within said district . . .; and to preserve and care for such public reservations . . . In furtherance of the powers herein granted, said board may employ a suitable police force, make rules and regulations for the government and use of the public reservations under their care, and for breaches thereof affix penalties not exceeding twenty dollars for one offence, to be imposed by any court of competent jurisdiction . . ."

It is believed that the above quoted section from the acts establishing the various Reservation Commissions above listed should be construed as extending to these commissions the same power to make regulations and affix penalties as is conferred on the metropolitan parks commission by Acts of 1893, c. 407, § 4. While the language of the act creating the Walden Pond State Reservation Commission is not identical, it is believed to be sufficient to produce the same result.

Acts of 1947, c. 544 — Metropolitan Transit Authority	—	—	—	—
Acts of 1952, c. 354 — Massachusetts Turnpike Authority	—	—	—	—
Acts of 1953, c. 606 — Mount Greylock Tramway Authority	—	—	—	—
Acts of 1953, c. 660 — Boston Arena Authority	—	—	—	—
Acts of 1956, c. 465 — Massachusetts Port Authority	—	—	—	—
Acts of 1958, c. 606 — Massachusetts Parking Authority	—	—	—	—
Acts of 1960, c. 701 — Woods Hole, Martha's Vineyard and Nantucket Steamship Authority	—	—	—	—

Note: The seven last mentioned organizations are corporations of a kind not generally recognized up to about thirty years ago. Although each is subject to public management one way or another, each is authorized to adopt an official seal, to acquire and dispose of property, to sue and be sued in its own name, plead and be impleaded in like manner as other corporations are. Each thus has a corporate personality distinct from that of the Commonwealth.

No express power to make regulations appear to have been conferred on the Metropolitan Transit Authority, the Mount Greylock Tramway Authority, or the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority. Express power to make regulations is conferred on each of the other four authorities. The pertinent language in each case is as follows:

Massachusetts Turnpike Authority (Acts of 1952, c. 354, § 5 (*i*)) "To establish rules and regulations for the use of the turnpike;"

Boston Arena Authority (Acts of 1953, c. 669, § 3 (*g*)) "To establish rules and regulations, and fix policies, for the use of said arena as an indoor hockey and skating rink and for the other purposes provided for in this act;"

Massachusetts Port Authority (Acts of 1956, c. 465, § 3 (*g*)) "To . . . . operate the projects under its control, and to establish rules and regulations for the use of any such project;"

Massachusetts Parking Authority (Acts of 1958, c. 606, § 5 (*h*)) "To establish and revise from time to time rules and regulations for the use of the common garage project, and to provide penalties for the violation of said rules and regulations not exceeding fifty dollars for each such offence, which upon payment into court shall be accounted for and paid to the Authority;"

It is thought that the regulations authorized by the foregoing statutes are not "Regulations" within the meaning of the Administrative Procedure Act; and that the seven "Authorities" here under discussion do not "enforce" or "administer" any "law," but are rather to be regarded as proprietors exercising the powers of an owner with respect to the properties severally in their charge. These "Authorities" are to be distinguished from the seven "Reservation Commissions" previously listed in that the properties managed by the several "authorities" are their own corporate property, whereas the property managed by the several "Commissions" is not the corporate property of anyone but is rather the public, or common, property of all the people of the Commonwealth.

The "Commissions," in other words, act as agents of the General Court. The "Authorities," on the other hand, act as trustees of an express trust.

INDEX TO SCHEDULE OF AGENCIES

Note: This alphabetical index of the agencies listed in the foregoing schedule uses columnar references; *First:* To the chapter of the General Laws under which the agency is listed; *Second:* To the identification number of the agency under the chapter; *Third:* An entry "R" if either "R2" or "R 3" appears opposite the agency in the schedule; *Fourth:* An entry "A" if the letter "A" appears opposite the agency in the schedule.

Caveat: The index should not be relied upon as a means of determining the number of agencies listed, since an attempt has been made to list each agency under each word which a searcher is likely to use. Consequently, many agencies are entered twice, and a few three times.

	G. L. Chapter	Item	R	A
Board of Registration (of) (in)				
Accountants, Certified Public	13	12	R	A
Architects	13	16	R	A
Barbers	13	14	R	A
Chiropody	13	4	R	A
Electrologists	13	21	R	A
Embalming	13	10	R	A
Engineers; Professional	13	17	R	A
Funeral Directing	13	10	R	A
Hairdressers	13	15	R	A
Medicine	13	3	R	A
Nursing	13	5	R	A
Opticians; Dispensing	13	18	R	A
Optometry	13	6	R	A
Pharmacy	13	8	R	A
Real Estate Brokers and Salesmen	13	20	R	A
Sanitarians	13	19	R	A
Surveyors; Land	13	17	R	A
Veterinary Medicine	13	9	R	A
Board of Retirement; State	10	1	R	A
Board of Review; Aquatic Nuisances	17	4	—	A
Board of Review; Employment Security	23	4	—	A
Board of Review; Hospital and Sanatoria	17	5	—	A
Board of Schoolhouse Structural Standards	22	7	R	—
Board of Standards (Department of Public Safety)	22	8	R	—
Board of State Examiners of Plumbers	13	13	R	A
Boiler Rules, Board of	22	3	R	—
Boston Arena Authority; Acts of 1953 c. 660	—	—	—	—
Boxer's Fund Board	6	21	—	—
Boxing Commission; State	22	7	R	A
C				
Chiropody; Board of Registration in	13	4	R	A
Civil Service Commission	13	1	—	—
Collegiate Authority; Board of	15	3	—	A
Commission on Administration and Finance	7	—	R	A
Commission Against Discrimination	6	11	R	A
Commissioner (of) (on)				
Agriculture	20	1	R	A
Banks	26	1	R	A
Corporation and Taxation	14	3	R	A
Education	15	2	R	A
Insurance	26	5	R	A
Labor and Industries	23	1	R	A
Natural Resources	21	2	R	A
Public Health	17	2	R	A
Public Safety	22	1	R	A
Veterans' Services	6	3	R	A
Commissioners of				
Pilots	103	—	R	A
Public Works	16	1	R	—
Uniform State Laws	6	4	—	—

	G. L. Chapter	Item	R	A
H				
Hairdressers; Board of Registration of	13	15	R	A
Health; Welfare and Retirement Trust Funds Board	23	6	R	—
Housing Board; State	6	14	R	A
I				
Industrial Accident Board	23	8	—	—
Industrial Rehabilitation Board	23	9	—	—
Insurance; Commissioner of	26	5	R	A
J				
K				
L				
Labor and Industries; Commissioner of	23	1	R	A
Labor Relations Commission	23	5	R	A
Library Commissioners; Board of	15	4	R	—
Licenses to Act as Engineer, etc.; Board of Appeal on	22	4	—	A
Livestock Disease Control; Direction of Division of	20	3	R	A
M				
Marine Fisheries; Director of Division of	21	3	R	A
Massachusetts Aeronautics Commission	6	12	R	A
Massachusetts Atomic Energy Commission	6	18	—	—
Massachusetts Discrimination; Commission Against	6	11	R	A
Massachusetts Parking Authority; Acts of 1958, c. 606	—	—	—	—
Massachusetts Port Authority; Acts of 1956, c. 465	—	—	—	—
Massachusetts Turnpike Authority; Acts of 1952, c. 354	—	—	—	—
Medicine, Dental, and Nursing Scholarship Board	6	22	—	—
Mental Health; Department of	19	—	—	A
Metropolitan District Commission	28	—	R	A
Metropolitan Transit Authority; Acts of 1947, c. 544	—	—	—	—
Milk Control Commission	20	6	R	A
Milk Regulation Board	6	7	R	—
Minimum Wage Commission	23	10	R	—
Motor Boats; Director of Division of	16	4	R	A
Motor Vehicles Liability Policies, Board of Appeal on	26	7	—	A
Motor Vehicles; Registrar of	16	2	R	A
Mount Everett Reservation Commission; Acts of 1908, c. 571	—	—	R	—
Mount Greylock Tramway Authority; Acts of 1953, c. 606	—	—	—	—
Mount Sugar Loaf State Reservation Commission; Acts of 1907, c. 541	—	—	R	—
Mount Tom State Reservation Commission; Acts of 1903, c. 264	—	—	R	—
N				
Natural Resources; Board of	21	1	R	—
Natural Resources; Commissioner of	21	2	R	A
Nursing; Board of Registration in	13	5	R	A

	G. L. Chapter	Item	R	A
O				
Outdoor Advertising Board	16	3	R	A
Opticians; Board of Registration of	13	18	R	A
Optometry; Board of Registration in	13	6	R	A
P				
Pharmacy; Board of Registration in	13	8	R	A
Pilots; Commissioner of	103	2	R	A
Plant Pest Control; Director of Division of	20	4	R	A
Plumbers; Board of State Examiners of	13	13	R	A
Public Bequest Commission	6	5	—	—
Public Charities; Director of	12	1	R	—
Public Health; Commissioner of	17	2	R	A
Public Health Council	17	1	R	A
Public Safety; Commissioner of	22	1	R	A
Public Utilities Commission	25	1	R	A
Public Welfare; Department of	18	1	R	A
Public Works; Commissioner of	16	1	R	—
Purgatory Chasm State Reservation Commission; Acts of 1919, c. 327	—	—	R	—
Q				
R				
Racing Commission; State	6	9	R	A
Real Estate Brokers and Salesmen; Board of Registration of	13	20	R	A
Registrar of Motor Vehicles	16	2	R	A
Registration; Director of	13	2	R	—
Retirement Board; Contributory	32	—	—	A
Retirement Board; Teachers'	15	6	R	A
Retirement; State Board of	10	1	R	A
S				
Sanitarians; Board of Registration of	13	19	R	A
School Building Assistance Commission	15	7	R	—
Schoolhouse Structural Standards; Board of	22	7	R	—
Small Loans Regulatory Board	26	3	R	—
Standards, Board of (Department of Public Safety)	22	8	R	—
Standards and Necessaries of Life; Director of Division of (Department of Labor and Industries)	23	2	R	A
State				
Ballot Law Commission	6	6	R	A
Board of Retirement	10	1	R	A
Boxing Commission	22	7	R	A
Examiners of Electricians	13	11	R	A
Examiners of Plumbers	13	13	R	A
Fire Marshal	22	2	—	A
Housing Board	6	14	R	A
Racing Commission	6	9	R	A
Reclamation Board	252	—	—	A
Secretary	9	1	R	—
Tax Commission	14	1	R	A
Surveyors, land; Board of Registration of	13	17	R	A

	G. L. Chapter	Item	R	A
T				
Teachers' Retirement Board	15	6	R	A
Trust Funds Board; Health, Welfare, and Retirement	23	6	R	—
U				
Uniform State Laws, Commissioners of	6	4	—	—
Urban and Industrial Renewal; Division of	18	2	R	—
V				
Veterans' Services; Commissioner of	6	3	R	A
Veterinary Medicine; Board of Registration in	13	9	R	A
W				
Wachusett Mountain State Reservation Commission; Acts of 1899, c. 378	—	—	R	—
Walden Pond State Reservation Commission; Acts of 1922, c. 499	—	—	R	—
Water Resources Commission	21	5	R	—
Weather Amendemnt Board	6	16	—	A
Wood's Hole, Martha's Vineyard, and Nantucket Steamship Authority; Acts of 1960, c. 701	—	—	—	—
X				
Y				
Youth Service Board	6	15	—	—
Z				

The services of a non-member of the Contributory Retirement System for State Employees who is a State official, terminates upon his attaining the maximum age.

Aug. 14, 1961.

Hon. John T. Driscoll, *Chairman, State Board of Retirement.*

Dear Sir: — In your letter of recent date you request an opinion relative to your duties concerning the chairman of the Government Center Commission.

You state that your board has been advised that William F. Callahan, chairman of the Government Center Commission, attained age 70 as of June 12, 1961; that Mr. Callahan is not a member of the State Employers' Retirement System, having commenced his present period of service after attaining age 60. You further state that Mr. Callahan applied for membership in the retirement system but withdrew the application.

In view of those facts, you request my opinion "as to what duty or responsibility now evolves upon the board when considering Mr. Callahan's case under the provisions of G. L. c. 32, and more specifically under the provisions of § 20, (5) (*e*)."

Your request requires a construction of various provisions of G. L. c. 32, entitled "Retirement Systems and Pensions." One fact impresses me as I read the various sections, apparently put together with much care by the General Court, relating to matters raised by your request. The statutory pattern of c. 32 indicates a general over-all intent that public employees must not continue to serve after arriving at the age of 70, except in specific cases and subject to the provisions of St. 1950, c. 639, § 9 (*h*). For example, § 1 of c. 32 defines "maximum age" as the age on the last day of the month in which any member classified in Group 1 as provided for in subdivision (2) (*g*) of § 3 attains age 70 or, if classified in Group 2 or Group 3, attains age 65.

Section 3 contains many restrictions and limitations of the right to become entitled to the benefits of membership in the public contributory retirement system. Subdivision (2) (*e*) and (*f*) of § 3 read as follows:

"(*e*) *No member*, except as otherwise provided for in subdivision (1) of section five or in section ninety-one, or in section twenty-six of chapter six hundred and seventy of the acts of nineteen hundred and forty-one, or in chapter sixteen of the acts of nineteen hundred and forty-two as amended, *shall remain in service after attaining the maximum age for his group* or after the date any retirement allowance becomes effective for him, whichever event first occurs. (Emphasis supplied.)

"(*f*) No person who enters or who re-enters the service of any governmental unit as an employee after attaining age sixty, and after the date when a system becomes operative therein, shall become a member except as otherwise provided for in this section. No such employee other than an elected official or a state official, as defined in section one, shall remain in the service of such governmental unit after attaining the maximum age for the group in which he would have been classified if he had become a member, except under *the same conditions which are applicable to a member as set forth in paragraph (e) of this subdivision.* Any employee who was not eligible for membership because of originally entering the service of any governmental unit after attaining age fifty-five but before attaining age sixty, may apply for and be admitted to membership upon the terms and

conditions set forth in subdivisions (3) and (3A) if under the maximum age for his group on the date of his application." (Emphasis supplied.)

Section 5 contains numerous conditions for allowance of superannuation retirement benefits. Subdivision (1) (*d*) of § 5 contains detailed provisions for holding over after reaching the maximum age limit of elective public officials. Section 20 of c. 32 seems to be clear and unequivocal. Section 20 (5) (*c*) reads as follows:

"(*c*) The board of each such system shall keep a record of the date of birth of each member of the system, and also shall keep a record of the date of birth of each other employee who entered or re-entered the service of the governmental unit to which such system pertains after attaining age sixty and after the date when the system became operative therein. It shall be the duty of such board to notify each such member or employee, the head of his department and the treasurer or other disbursing officer responsible for paying his compensation, of the date when such member *or employee* will attain the maximum age for his group, and such member *or employee* shall not be employed in any governmental unit after such date except as otherwise provided for in sections one to twenty-eight, inclusive. Such notification shall be made in writing not less than thirty days nor more than four months prior to such date." (Emphasis supplied.)

It should be noted that the General Court took pains to include within its scope not only members of the contributory retirement system but also non-member employees. You advise me that Mr. Callahan is a non-member employee in the service of the Commonwealth. It would appear that § 20 applies to the situation you refer to. Section 91 provides another indication of the legislative intent relative to retirement at age 70. It is there provided that no person after having been retired shall, while receiving his retirement allowance, be paid for certain public services specified therein with an exception in favor of those appointed for a term of years to a position by the Governor with or without the advice and consent of the Council, in which event the retired employee may be paid the compensation to which he is entitled under the new appointment provided he waives his retirement allowance while so re-employed.

However, since you advise me that the chairman does not belong to the State Employees' Retirement System, the provisions of § 91 do not apply to him. Those provisions do, however, indicate a determination by the General Court not to permit the re-employment of public officials after the attainment of the maximum age limit of 70 except in a very limited number of cases, of which the instance you refer to is not one.

My attention has been called to an opinion of the Attorney General dated May 27, 1946 (Attorney General's Report, p. 115), which ruled that a State employee who had voluntarily elected not to join the State Employees' Retirement System was not obliged to retire at 70 because the controlling statute did not so provide. In discussing the subject, the Attorney General stated that a non-elective employee, not a State official, was obliged to retire at the maximum age and from that it might be inferred that a State official was not. However, it is quite apparent that the Attorney General did not take into consideration § 20 (5) (*c*).

It is possible to argue that § 3 (2) (*f*), quoted above, which requires non-members to retire on reaching the maximum age for their group, may contain in it an exception on behalf of elected officials and State officials. The language, however, is somewhat ambiguous. It should not be construed to create an exception to the general policy set forth in c. 32. As previously

stated, the chapter covers retirement of all State employees whether or not members of the retirement system. It has, among others, the purpose of preventing employees from accepting a salary in addition to a retirement allowance. It also has the purpose of requiring employees to retire at a fixed age, thus creating an incentive to other employees who may look forward to promotions. Such desirable purposes should not be defeated by an over legalistic interpretation of an isolated subdivision of the statute.

It is more reasonable to assume that the Legislature expected that State officials, whether or not members of the system, should all be treated alike as indicated by the fact that paragraph (*f*) specifically provides that exceptions as to the continued employment of non-members shall be the same as the exceptions available to members set forth in paragraph (*e*).

In the light of the foregoing, I am of the opinion that pursuant to the provisions of G. L. c. 32, § 20 (5) (*e*), Mr. Callahan's tenure of office is terminated by the statute.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The Alcoholic Beverages Control Commission was not precluded from rehearing its disapproval of a local grant of a package store license because of the local board's rescission of its grant.

AUG. 21, 1961.

Alcoholic Beverages Control Commission.

GENTLEMEN: — In your recent letter you requested an opinion on the following facts:

On April 17, 1961, you received notice from the Board of Selectmen of the town of Weymouth that an application for a "Package Goods" Store license for the sale of all kinds of alcoholic beverages for certain premises had been approved. Under date of May 19, 1961, notice was sent to the applicant advising that a hearing would be held at the commission's office on Tuesday, June 6, 1961, on the question of the approval by the Commission of the application for the license. The hearing was held as scheduled. Under date of June 8, 1961, notice was sent to the applicant that its application had been disapproved. Notice of this action was also sent to the Board of Selectmen. On June 15, 1961, the applicant filed a motion for rehearing with your commission. On July 11, 1961, the commission voted to grant the applicant's motion for a rehearing on the question of granting approval to its application, and assigned Tuesday, August 1, 1961, as the date thereof. On July 26, 1961, the commission was in receipt of a notice under date of July 25, 1961, advising of a vote taken by the Board of Selectmen of the town of Weymouth at a regular meeting held on July 24, 1961, wherein it rescinded its approval of the application of April 12, 1961.

You now ask the following question: Whether or not, as a matter of law, in view of the facts cited herein, the July 23, 1961 vote of the Board of Selectmen of the town of Weymouth precludes further action by your commission at this time on the application referred to for a "Package Goods" Store license for the sale of all kinds of alcoholic beverages for the premises involved.

General Laws c. 138, § 16B, provides that:

"Applications for licenses or permits authorized to be granted by the commission shall be granted or dismissed not later than thirty days after the filing of the same, and, except as provided in section sixteen A, applications for licenses authorized to be granted by the local licensing authorities, and applications for transfers of licenses issued by such local licensing authorities under section twenty-three, shall be acted upon within a like period and if favorably acted upon by the said authorities shall be submitted for approval by the commission not later than three days following such favorable action. . . ."

Once the thirty-day period has ended, the local licensing authority has exhausted its powers in the matter. Then this section gives jurisdiction to the commission after the local licensing authority has acted.

The decision was adverse to the applicant, who then availed itself of a right to a rehearing which is provided for in regulations numbered 49 and 49A of Commission Regulations which provide as follows:

(49) "When, after hearing and consideration, an issue upon appeal has been decided there shall be no rehearing of the same issue within the current license year, except that upon motion by the aggrieved party accompanied by his affidavit, filed within seven days from the time said party received notice of said decision from the Commission. . . ."

(49A) "The provisions of Regulation No. 49 shall apply to rehearings upon applications for approval of licenses and upon petitions to investigate the granting of licenses or the conduct of the business being done thereunder."

A rational construction of the statute and regulation indicates that the Legislature, which empowered the commission to regulate this entire industry, gave jurisdiction over the approval of all licenses to the commission at the stage of the proceedings beyond the action of the local board.

In this matter, a rehearing appeal was pending when the local licensing authority purported to act. The matter had passed from the local jurisdiction to the control and dominion of the commission. The Legislature would not have provided this machinery for disposing of these applications if such legislation could be rendered ineffective. "An intent to pass an ineffective statute is not to be imputed to the Legislature." *Repucci* v. *Exchange Realty Co.*, 321 Mass. 571.

For the local authorities to be able to abort these statutory procedures would be a usurpation of the duties and jurisdiction of the commission.

In view of this reasoning, the action of the Weymouth Board of Selectmen of July 24, 1961, in rescinding its prior approval of April 12, 1961, is a nullity.

I answer your question, accordingly, in the negative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By JOHN J. COFFEY,
Assistant Attorney General.

The 1961 amendment to G. L. c. 92, § 5A, does not permit the Metropolitan District Commission to change the percentage of the assessment on Boston to be apportioned over the rest of the Metropolitan Sewerage District while the Boston main drainage district remains unconnected with the Metropolitan system.

Aug. 28, 1961.

Hon. Robert F. Murphy, *Commissioner, Metropolitan District Commission.*

Dear Sir: — Your letter of recent date relates to Metropolitan Sewerage District assessments.

In it, after calling our attention to St. 1961, c. 230, amending G. L. c. 92, § 5A, as appearing in St. 1959, c. 612, § 3, you state that St. 1959, c. 612, § 9, provides that if on any November first the Boston Main Drainage District is not connected to sewers operated by the Metropolitan Sewerage District, 52% of the amount which would be apportioned to the city of Boston, under G. L. c. 92, shall be divided among the other cities and towns in the sewerage district.

In the light of the foregoing, you request the opinion of the Attorney General

". . . as to whether or not under St. 1961, c. 230, the commission has the authority to make any changes in the 52% ratio specified in St. 1959, c. 612, § 9, if any inequities may be found to exist under this ratio."

Chapter 612 of the Acts of 1959 is entitled "AN ACT REVISING THE BASIS FOR APPORTIONMENT OF COSTS OF CONSTRUCTION AND OPERATION OF THE SEWERAGE SYSTEM OF THE METROPOLITAN DISTRICT COMMISSION." Section 3 of c. 612 amends G. L. c. 92 by striking out §§ 5 and 6 and inserting in place thereof four new sections. The new § 5 provides in substance that the proportion to be paid the Commonwealth annually to meet interest and principal requirements shall be determined by dividing the aggregate capacity of municipal sewers of each city and town connected to sewers operated by the commission by the total capacity of all municipal sewers connected to district sewers with certain limitations therein stated.

A new § 5A inserted by § 3 provides that not later than September 1, 1960, and in every fifth year thereafter, the commission shall establish the proportion in which each of the cities and towns served by the system shall annually pay money to the Commonwealth to meet interest and principal requirements to be borne by all cities and towns served by the metropolitan sewerage system as provided in § 5 with certain limitations as to changes made in the proportions established in the year 1960.

Section 5 of c. 612 provides that in determining the proportion in which the several cities and towns served by the metropolitan sewerage system shall pay money to the Commonwealth to meet interest and principal requirements in the year 1960, the commission, in discharging duties imposed upon it by G. L. c. 92, § 5A, inserted by St. 1959, c. 612, § 3, shall adopt the following apportionment. The apportionment for each city and town in the district is set forth in § 5 in terms of percentages. Boston's percentage is 36.18.

Section 9 of c. 612 provides that if on any November first the Boston main drainage district has not been connected to sewers operated by the Metropolitan Sewerage District, 52% of the amount which would be apportioned to the city of Boston under G. L. c. 92 shall be divided among all other cities and towns in the sewerage district.

In this state of affairs you now inquire whether your commission has authority to make any changes in the 52% ratio specified in § 9, if any inequities may be found to exist under this ratio.

In the case of *Town of Milton, et als.* v. *Metropolitan District Commission*, 342 Mass. 222, the Supreme Court had occasion to interpret the legislation above referred to. Following this decision, the General Court enacted St. 1961, c. 230, which struck out the first sentence of § 5A of G. L. c. 92, as appearing in § 3 of c. 612, and inserted a new first sentence in place thereof. The principal changes resulting from c. 230 are that your commission is required to establish not later than September 1, 1961, and in each year thereafter, the proportion in which each of the cities and towns served by the system shall annually pay money to the Commonwealth to meet interest and principal requirements instead of each five years as provided in § 5A prior to the enactment of c. 230. Section 5A as amended by c. 230 is broadened substantially by a provision authorizing changes in the proportions established, justified by inequities, if any, which the commission, prior to September 1, 1961, may find to exist in the proportions established in the year 1960.

A reading of the various sections dealing with the subject matter you refer to leads me to the conclusion that the commission, under the applicable provisions of the statutes above referred to, has the duty to apportion and fix the proportions which the several cities and towns served by the metropolitan sewerage system shall pay money to the Commonwealth to meet interest and principal requirements.

It, in my opinion, has no power to change the statutory provision found in § 9 of c. 612 providing for a division among the other cities and towns of the sewerage district, of 52% of the amount which would be apportioned to the city of Boston under c. 92.

The General Court has specifically fixed, by the provisions of § 9, the percentage of the city of Boston's apportionment among the other cities and towns in the event of the circumstances authorizing such division. I am aware of no provision authorizing your commission to vary the "52%" provision.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

The road construction work to be done at the cost of Boston University under St. 1961, c. 425, if certain conveyances of land along Storrow Drive should be made to the University, could be effected by an agreement of the University to assume the cost thereof and the awarding by the Commission of a contract stipulating that the contractor is to look only to the funds supplied by the University for payment for the work to be done.

Aug. 31, 1961.

Hon. Robert F. Murphy, *Commissioner, Metropolitan District Commission.*

Dear Sir: — You have requested an opinion as to whether certain procedures would satisfy the requirements of the provisions of St. 1961, c. 425.

As you point out in the letter in which you make the request, the statute referred to author zes the commission, if it makes certain determinations, to discontinue parts of certain public streets in the city of Boston paralleling the James J. Storrow Memorial Drive and to substitute therefor an additional lane, or additional lanes, of roadway to the southerly roadway of said Drive. It further authorizes the commission to enter into a contract with Boston University providing (1) for the conveyance by the commission to the University, subject to such conditions and restrictions as to the manner of use thereof as the commission decides should be imposed, of the portion of Bay State Road discontinued and such other lands adjacent thereto as the commission determines are no longer needed for the purposes of the Charles River Reservation, and (2) that the University will reimburse the commission for the cost of constructing such extra lane or lanes of roadway and the cost of the construction of connections therewith to existing public ways, and will pay to the commission such other amounts, if any, as may be mutually agreed upon.

You state in your letter that the Legislature did not appropriate any funds for paying the cost of the construction work which is involved if the conveyance authorized should be made, and ask whether, in the event of such conveyance, an arrangement under which the estimates of work done by the contractor should be paid upon approval by the commission directly to the contractor by the University would be in conflict with the act or any other provision of law.

I assume you have in mind that in addition to the actual cost of construction, as to which you suggest the procedure stated, there would be other direct and indirect costs which would necessarily be paid directly by the commission and that you plan to have a separate agreement with the University for a determination of those costs and reimbursement to the commission therefor.

It is to be noted that the act you refer to was declared by the Governor, acting under the provisions of Article XLVIII of the Amendments to the Constitution, to be an emergency law, to take effect forthwith, in order to facilitate the construction of a new law school building for the University to replace the present building which has been taken as part of the site for the State Office Building.

It would appear, in view of the declaration of the Governor, the circumstances referred to by him and the provisions of the act that the act is to be taken to authorize the making of some arrangements by which the direct cost of construction represented by payments under a contract for the doing of the actual construction work involved would be paid by the

University, with the result that the only costs to be incurred by, and reimbursed to, the commission would be those referred to above.

In an opinion of the Attorney General dated April 7, 1937, Attorney General's Report, 1937, p. 79, referring to a contract under which a contractor agreed to look only to funds supplied by the Federal Government for the performance of the work under the contract, it is stated, at page 81:

"The company, however, was bound by the terms of its contract, and its total compensation could not exceed the amount forwarded by the Federal government for the performance of its work. The exclusive source of payment of this contract was Federal funds, and the contractor could not look to the Commonwealth for payment. It has been frequently held by our courts that a provision of a contract by which one obligates himself to look to a special source or fund for his compensation is valid, and it has been consistently upheld. *Hussey* v. *Arnold*, 185 Mass. 202; *McCarthy* v. *Parker*, 243 Mass. 465; *Baker* v. *James*, 280 Mass. 43."

I advise you, therefore, that if an agreement is entered into with the commission by which the obligation referred to is assumed by the University, under such terms and conditions as the commission determines are necessary to protect the public interest, and it is made clear in the proposals, specifications and contract for the work that the contractor is to look only to funds which the University is to make available under the terms of its agreement with the commission for his compensation for the work to be done under the contract, and the contract otherwise meets the requirements of law as to contracts for the construction of public works for the commission, the contemplated procedure would not be in conflict with the act referred to or any other provision of law.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

The statute providing for "no-fix" notices of motor vehicle violations is applicable to the State Police.

SEPT. 1, 1961.

HON. FRANK S. GILES, *Commissioner of Public Safety.*

DEAR SIR: — You have requested an opinion as to the application of St. 1961, c. 592, to your department.

Chapter 592 of the Acts of 1961 is entitled "AN ACT RELATIVE TO SUMMONSES FOR VIOLATIONS OF THE MOTOR VEHICLE LAWS, REQUIRING FILING OF COPIES THEREOF AND PROVIDING FOR AN AUDIT SYSTEM IN CONNECTION THEREWITH." It has an emergency preamble stating that whereas, the deferred operation of this act would tend to defeat its purpose, which is to provide a system of summonses for violations of the motor vehicle laws, requiring filing of copies thereof and providing for an audit system in connection therewith, it is declared to be an emergency law, necessary for the immediate preservation of the public safety and convenience.

Section 1 strikes out the present § 27 of G. L. c. 90 and inserts a new

§ 27, which provides in substance that whenever an operator of a motor vehicle is halted by a police officer for any violation of any statute, by-law, ordinance or regulation relating to the operation or control of motor vehicles other than violations of § 20A, the police officer shall make out a notice of such violation and such notice shall be referred forthwith to the chief of police *or chief administrative officers of the traffic enforcement agency,* who shall either send a written warning, or refer the matter to the Registrar of Motor Vehicles for action, or apply for a summons to the district court having jurisdiction. Detailed provisions follow relative to the form, substance and endorsement of copies of the notice. Further enforcement provisions, when necessary, are included.

A reading of the new § 27 discloses numerous references to the "police department" and "the chief of police." It is to be noted that while the words "chief of police" might be construed to limit the new § 27 to municipal police departments, it should be observed that in almost every instance where the phrase "chief of police" appears, it is followed by the provision "or chief administrative officer of the traffic enforcement" or words of similar import.

It is obvious to me, therefore, that the General Court intended that the new § 27 should have broader application than merely to municipal or local police officers. The purpose and scope of the measure as evidenced by the title and emergency preamble would justify, if not require, a similar conclusion.

A police officer initiates the proceedings under § 27. The term "police officer" is defined in § 1 of c. 90 as "any constable or other officer authorized to make arrest or serve process, provided he is in uniform or displays his badge of office."

General Laws c. 147, § 2, provides that "*all* officers and inspectors of the department shall have and exercise throughout the commonwealth the powers of constables, police officers and watchmen, except as to service of civil process." A patrolman in the Division of State Police of the Department of Public Safety has been held to be a member of a police department. *Commonwealth* v. *Gorman,* 288 Mass. 294. *Hayes* v. *Lumbermens Mutual Casualty Co.,* 310 Mass. 81.

I believe that a proper construction of this measure compels the conclusion that it should be and is applicable to State highways as well as other public roads.

It is my opinion, therefore, that St. 1961, c. 592 is applicable to the Department of Public Safety.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The installation of gas fittings and inspection thereof in state-owned buildings, schools, and hospitals, is governed by the uniform state-wide code authorized to be promulgated by the board established under St. 1961, c. 737, and such inspection is not within the jurisdiction of the Board of Examiners of Plumbers.

SEPT. 6, 1961.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — In your letter of recent date, relative to the inspection of gas installations, you pose the following question:

"Does the inspection of gas installations in state-owned buildings and in schools and hospitals in towns that do not have a plumbing code come within the jurisdiction of this board?"

General Laws c. 142, is entitled "Supervision of Plumbing." It does not contain many provisions relative to the subject of gas fitting except that in § 3, as recently amended by St. 1960, c. 190, it is provided that any licensed master plumber of journeyman may carry on the work of a gas fitter throughout the Commonwealth notwithstanding any local ordinance, by-law, rule or regulation to the contrary.

In 1960, however, the General Court made a serious effort to bring up to date the business of gas fitting. Chapter 737 of that year is entitled "AN ACT PROVIDING FOR THE PROMULGATION OF UNIFORM RULES AND REGULATIONS TO GOVERN GAS FITTING IN BUILDINGS THROUGHOUT THE COMMONWEALTH." Section 1 of c. 737 inserts a new § 12H of G. L. c. 25 relating to the Department of Public Utilities. The new § 12H creates in the Department of Public Utilities a board consisting of various officers of the Commonwealth or persons designated by them, with the power to make, alter, amend and repeal rules and regulations relative to gas fittings in buildings *throughout* the Commonwealth. Said rules are to be reasonable, *uniform* and designed to prevent fire, explosion, injury and death and are not to be inconsistent with the provisions of c. 142 or the rules and regulations made under authority thereof or the qualification of master plumbers and journeymen plumbers as gas fitters contained in § 3 of c. 142. "Gas fitting" is defined to include installation, alteration and replacement of fixtures, appliances and facilities used or intended to be used with fuel gas of any kind, including natural gas, manufactured gas, and liquefied petroleum gas-air or mixtures thereof.

Section 2 of c. 737 inserts after § 3L of G. L. c. 143, two new sections, 3N and 3O. Section 3N provides, in substance, that no person shall engage in gas fitting in Boston without making application and obtaining a permit therefor in accordance with the Boston Building Code, nor engage in gas fitting in any other city or town without first giving such notice as shall be prescribed by rules and regulations made by the board, which I have referred to. Section 3O provides, in substance, that each city and town shall provide by ordinance or by-law for the appointment of an inspector of gas piping and gas appliances in buildings, whose duty it is to enforce the rules and regulations of said board.

Section 3 of c. 737 provides, in substance, that notwithstanding the provisions of § 3O of c. 143, above referred to, any municipal officer or employee who, on the effective date of the act, is charged with the duty of inspecting gas piping and gas appliances shall continue to perform such duties and

shall be designated and named the inspector of gas piping and gas appliances, as provided in § 30.

Section 4 of c. 737 provides that all by-laws and ordinances of cities and towns relating to gas fitting within buildings are hereby annulled.

In answering your question, which relates to three different types of buildings — state-owned, schools and hospitals — it may be well to bear in mind at the outset that the purpose of c. 737 is to provide uniform rules and regulations governing gas fitting in buildings throughout the Commonwealth. As to the scope of the structures, it may be noted that § 2 of c. 737 ties this legislation up with G. L. c. 143 by inserting §§ 3N and 30 therein.

Section 2A of c. 143 provides specifically that

"The provisions of this chapter relative to the safety of persons in buildings shall apply to buildings and structures, other than the state house, owned, operated or controlled by the commonwealth, and to buildings and structures owned, operated or controlled by any department, board or commission of the commonwealth, or by any of its political subdivisions, in the same manner and to the same extent as such provisions apply to privately owned or controlled buildings occupied, used or maintained for similar purposes. The provisions of this chapter relative to the inspection of buildings privately owned shall apply in the same manner to the inspection of buildings subject to this section. . . ."

Accordingly, it is not difficult to understand that the gas fitting rules and regulations relate to the structures referred to in your question. Since the General Court has made such elaborate provisions for the promulgation of rules and regulations governing gas fitting in buildings throughout the Commonwealth and has made such careful provisions for the enforcement thereof, and has by § 4 of c. 737 wiped out all by-laws and ordinances of cities and towns relating to gas fitting within buildings, the full purpose of this legislation should be given effect.

Accordingly, it is my opinion that the inspection of gas installations in the structures you refer to does not come within the jurisdiction of the State Board of Examiners of Plumbers.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The requirement of matching federal funds to make appropriations for Sport Parachuting Commission effective, would not be satisfied by provision of matching funds from private sources.

SEPT. 7, 1961.

MR. ROBERT A. SPATOLA, *Executive Secretary, Sport Parachuting Commission.*

DEAR SIR: — In your recent letter you ask whether the requirements of St. 1961, c. 617, will be satisfied if the matching funds referred to in the act are obtained from private sources and without a government guarantee.

I point out to you that it is expressly provided in § 4 of the act that the funds authorized by the act shall not become available "until matching federal funds are made available by the federal government."

It is also to be noted that the proviso in the first sentence of § 1 of the act is conditioned upon an agreement being made jointly or separately "with the Sixth World Parachuting Championship Committee, Inc., and with any cooperating agency of the federal government. . . .", as authorized by St. 1960, c. 527, § 3, for a grant, etc., of not less than $100,000.

Although § 3 of said c. 527 provides generally that the commission is authorized "to avail itself of such aid and co-operation as will enable it to carry out the duties conferred upon it and to conduct successfully said championship meeting," the provisions of § 4 and § 1 of the 1961 act, are not such general provisions but are specific provisions making specific reference to funds to be made available by the Federal Government, in said § 4, and to a separate or joint agreement with the Sixth World Parachuting Championship Committee, Inc., and a co-operating agency of the Federal Government, in said § 1.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

The appropriation for the operation of the North Reading State Sanatorium, which was o be closed, permitted operation for only part of the fiscal year and, therefore, the separation from the service of employees having civil service and longevity tenure is required.

SEPT. 11, 1961.

ROBERT E. ARCHIBALD, M. D., *Deputy Commissioner of Public Health.*

DEAR SIR: — In your letter of recent date, relative to the employees in the Sanatorium at North Reading under your jurisdiction, you state that the Legislature failed to appropriate sufficient monies for the employees in the 1961–1962 budget as the initial step of a state-wide consolidation of tuberculosis care as the result of a diminishing incidence of tuberculosis in the face of advances in medical science, except for a limited carry-over appropriation for the purpose of closing out the institution.

You further state that the Division of Personnel and Standardization provided in its 1961–1962 budget for 208 permanent positions at the Sanatorium despite the fact that the Legislature failed to provide monies for these positions except for the limited carry-over, above referred to, for closing out the institution.

You further state that the employees were notified by letter on May 17, 1961, that the 1962 budget did not provide for continued operation of the Sanatorium after June 24, 1961; that the endeavors of your department and other State agencies have satisfactorily placed some of the employees, with the result that the personnel at the Sanatorium has now been reduced to approximately 65 permanent employees, fifteen of whom are so-called civil service employees, the remainder coming under the provisions of G. L. c. 30, § 9B. You further state that some of the employees have refused to accept a transfer and others have requested an opinion as to their rights under the civil service law and § 9B.

In the light of the foregoing, you pose the following question:

"Would you kindly favor us with an opinion as to whether or not the fact that the Legislature did not provide an appropriation for employees, except a limited appropriation for the purpose of closing out the institution, in its 1961–1962 budget, deprives the present employees at North Reading Sanatorium, who all have civil service protection under G. L. cc. 30 and 31, of their rights not to be transferred, discharged, dismissed, removed or suspended without their consent?"

General Laws c. 29, § 26, provides as follows:

"Expenses of offices and departments for compensation of officers, members and employees and for other purposes shall not exceed the appropriation made therefor by the general court or the allotments made therefor by the governor. No obligation incurred by any officer or servant of the commonwealth for any purpose in excess of the appropriation or allotment for such purpose for the office, department or institution which he represents, shall impose any liability upon the commonwealth."

To appropriate has been defined as "to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other." *Opinion of the Justices*, 323 Mass. 764, 766 and cases therein cited. The General Court has by statute imposed rigid restrictions upon the incurring of liability by municipal corporations in excess of appropriations made. G. L. c. 44, § 31. Similar rigid restrictions are imposed upon State officers. G. L. c. 29, §§ 26 and 27. The Constitution of Massachusetts itself contains restrictive provisions regulating carefully the payment of public funds from the treasury of the Commonwealth. Part 2d, c. II, § I, art. IX.

From the foregoing statutory and constitutional provisions, it appears that you have no power to expend monies nor to incur obligations in excess of appropriations. You state that some of the employees in the Sanatorium are civil service employees, so-called. Your rights and duties and their rights are, therefore, controlled by the pertinent provisions of G. L. c. 31 and the rules and regulations made thereunder, particularly § 43. The rights of such of the employees as come within the purview of G. L. c. 30, § 9B are as therein set forth.

I am certain that you are familiar with the provisions which are referred to, but for your convenience I enclose a recent compilation, issued by the Division of Civil Service, of the civil service law and rules. You will notice that there are special provisions in § 43 in cases where the separation from the service results "from lack of work or lack of money or from abolition of positions."

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

The only duty of the Secretary of the Commonwealth is to file a certificate of change of membership of a Redevelopment Housing Authority, and he has no concern with the legality of a person appointed in anticipation of a vacancy taking the oath before the expiration of the term of the incumbent.

SEPT. 19, 1961.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth.*

DEAR SIR: — In your letter of recent date, relative to the Somerville Redevelopment Authority, you state that on November 8, 1960, you received a notice from the City Clerk of Somerville advising that on April 14, 1960, Dennis F. Coleman was appointed to the Somerville Redevelopment Authority to replace Francis X. Burns, said term to expire in 1965. You further state that on November 14, 1960, you advised the City Clerk that the appointment would be for the remainder of the term expiring September 13, 1960, the date of expiration of the term of Francis X. Burns, and requested a new certificate to that effect.

You further state that on August 15, 1961, you received a letter from the Assistant City Clerk repeating the fact that the appointment was for five years, to which you replied requesting a certificate of reappointment because the vacancy should have been for the "remainder of the term." You go on to say that you have been advised on the telephone that Mr. Burns did not resign and Mr. Coleman did not take office until after the expiration of the term of Mr. Burns.

In the light of these facts, you pose the following questions:

"Could an appointment be made validly on April 21, 1960, by the Mayor and Board of Aldermen to replace a member whose term does not expire until September 13, 1960, for a term of five years?

"Would the qualifying oaths under this appointment which were taken April 22, 1960, have any effect, considering that the term of the incumbent would not expire until September 13, 1960?"

General Laws c. 121, § 26QQ, provides, among other things, that when a Redevelopment Authority is organized

". . . its members shall be appointed and a certificate of organization shall be issued, in the same manner as is provided by law in the case of a housing authority. . . ."

and further that

". . . all the provisions of law applicable to housing authorities in cities and towns, and the members thereof with respect to land assembly and redevelopment projects shall be applicable to redevelopment authorities and the members thereof . . ."

General Laws c. 121, § 26L, dealing with the election or appointment of members of housing authorities, provides, among other things, as follows:

"As soon as possible after the qualification of the members of a housing authority the city or town clerk, as the case may be, shall file a certificate of such appointment, or of such appointment and election, as the case may be, with the board and a duplicate thereof in the office of the state secretary. If the state secretary finds that the housing authority has been organized and the members thereof elected or appointed according to law, he shall issue to it a certificate of organization and such certificate shall be conclusive evidence of the lawful organization of the authority and of the election or appointment of the members thereof. Whenever the member-

ship of a housing authority is changed, by appointment, election, resignation or removal, a certificate and a duplicate certificate to that effect shall promptly be so filed. A certificate so filed shall be conclusive evidence of the change in membership of the housing authority referred to therein."

You will note from the above that upon receipt of the certificate of organization if the State Secretary finds that the housing authority has been organized and the members thereof elected or appointed according to law, he shall issue to it a certificate of organization and such certificate shall be conclusive evidence of the lawful organization of the authority and of the election or appointment of the members thereof. While you do not so state, I assume that the foregoing has been done and that you have issued the certificate of organization as provided by law. Following the above sentence, there are two more sentences dealing with a change in membership of a housing authority. You will note that the provisions are quite different from the foregoing. Section 26L goes on to say

"Whenever the membership of a housing authority is *changed*, by appointment, election, resignation or removal, a certificate and a duplicate certificate to that effect shall promptly be so filed. A certificate so filed shall be conclusive evidence of the change in membership to the housing authority referred to therein." (Emphasis supplied.)

You will note that no *finding* by the State Secretary is required. His duty is merely to receive the filed certificate and duplicate certificate. The accuracy of the certificate or its legal effect is not for the State Secretary to determine. He is not required to police the situation nor adjudicate the rights of the parties. The statute imposed upon the housing authority the duty to file the certificate and duplicate certificate. A corresponding duty rests upon the State Secretary to receive and file the same.

However, it might not be inappropriate for me to point out that the making of an appointment to fill a vacancy before it occurs, under some circumstances, may not be improper. V. Op. Atty. Gen. 116. In an opinion to the Executive Council dated May 12, 1960, concerning a somewhat similar situation, I stated:

"If the Governor and Council did not have authority to make appointments for anticipated vacancies during a reasonable period in advance of such vacancy, then it would not be possible to select an appointee in sufficient time so that he could occupy his office during the full statutory period established by the Legislature."

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A State employee who resigned and requested the withdrawal of her retirement deductions was no longer a "member-in-service" of the retirement system and, therefore, could not apply for accidental disability retirement.

SEPT. 19, 1961.

HON. JOHN T. DRISCOLL, *Chairman, State Board of Retirement.*

DEAR SIR: — You have written me stating that on November 18, 1958, the Industrial Accident Board approved a lump sum settlement in the amount of $3,000 to an employee upon an agreement between the employee and the Commonwealth; that on January 11, 1959, the employee returned to work at the Belchertown State School where she had previously been employed and remained in service until March 29, 1959. You further state that on March 29, 1959, the employee resigned her position as attendant nurse and on April 1, 1959, filed with your board a request for a refund of her accumulated total deductions; that under date of March 31, 1959, the Belchertown State School certified that the employee resigned on March 29, 1959; that in November of 1959, a check in the amount of $264.18 was forwarded to the employee representing the total credited to her account in the annuity savings fund, which check, uncashed, was forwarded on January 12, 1961, to the office of your board with the statement by the employee that "While the signature on the photostat (on the withdrawal request) looks like mine, I have no recollection of signing a Request for Withdrawal, nor did I ever intend to sign one, as it has been my intention to file an application for Accidental Disability Retirement"; that the employee has now filed an application for retirement for reasons of accidental disability dated February 10, 1961, and filed with the board on February 14, 1961.

In the light of the foregoing, you pose the following question:

"Whereas this employee resigned in March of 1959 and whereas in compliance with her request her accumulated total deductions were repaid to her in November of 1959, is this person a member in service of the retirement system and entitled to make application for retirement for reasons of accidental disability under the provisions of chapter 32, section 7?"

While I have no means of knowing whether the claim for an accidental disability retirement allowance is for the same injury for which the lump sum settlement was made, I assume, in the absence of anything to the contrary, that it is; no indication is given, also, of the date of the injury for which the lump sum settlement was made.

However, as you are, of course, aware, G. L. c. 32, § 7(1), which deals with the subject of accidental disability retirement allowances, provides specifically that "any member in service . . . who becomes totally and permanently incapacitated . . . by reason of a personal injury sustained or a hazard undergone as a result of and while in the performance of his duties at some definite place and at some definite time . . . without serious and wilful misconduct on his part . . ." upon application and subject to the provisions of § 7, shall be retired for accidental disability. No such retirement shall be allowed unless such injury was sustained within two years prior to the filing of such application or, if occurring earlier, unless written notice thereof was filed with the board within ninety days after its occurrence.

General Laws c. 32, § 7(3) (*a*) provides that lapse of time or failure to file notice of an injury sustained shall not be a bar to proceedings under § 7 if the member received payments on account of such injury under the provisions of G. L. c. 152.

The term "Member in Service" has been given special attention by the General Court in § 3(1) (*a*) (i), which reads as follows:

"Any member who is regularly employed in the performance of his duties, except a member retired for disability who upon partial recovery is restored to active service as provided for in paragraph (2) (*a*) of section eight. Any member in service shall continue as such during any period of authorized leave of absence with pay or during any period of authorized leave of absence without pay if such leave is due to his mental or physical incapacity for duty. In any event the status of a member in service shall continue as such until his death or until his prior separation from the service becomes effective by reason of his retirement, resignation, failure of re-election or reappointment, removal or discharge from his office or position, or by reason of an authorized leave of absence without pay other than as provided for in this clause. Any member in service shall have full voting powers in the system as provided for in section twenty."

I call your attention particularly to the following provision of § 3(1) (*a*) (i):

"*In any event* the status of a member in service shall continue as such until his death *or until his prior separation from the service becomes effective* by reason of his retirement, *resignation*, failure of re-election or reappointment, removal or discharge from his office or position, or by reason of an authorized leave of absence without pay other than as provided for in this clause." (Emphasis supplied.)

Section 10(4) deals with the subject of return of accumulated total deductions and provides under the circumstances therein referred to for a return of the member's accumulated total deductions

". . . upon his written request therefor on a prescribed form filed with the board *on or after the date of his termination of service*, . . ." (Emphasis supplied).

Section 11(1) (*a*) provides for a return of accumulated total deductions to members entitled thereto under the provisions of subdivision (4) of § 10.

General Laws c. 152, § 73, provides that any person entitled under § 69 to receive compensation from the Commonwealth and who is also entitled to a pension by reason of the same injury, shall elect whether he will receive such compensation or such pension and shall not receive both except in the manner and to the extent provided by § 14 of c. 32.

In view of the above circumstances, it is my opinion that the employee in question was not a "Member in Service" of the retirement system and entitled to make application for an accidental disability retirement allowance under the provisions of § 7 of c. 32.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

In view of the ambiguous wording of the waterways projects item of the Capital Outlay Act of 1961, the cost on which local contributions are figured should not exclude working plans as "preliminary plans." The Legislature can provide refunds if it considers the ambiguity should be so resolved.

Sept. 20, 1961.

Mr. John D. Bradford, *Acting Director, Division of Waterways, Department of Public Works.*

Dear Sir: — You have asked for an opinion as to the meaning of certain language contained in Item 8262-22 of St. 1961, c. 544, § 2.

The act referred to is the Capital Outlay Act of 1961. The item cited provides funds for a special capital outlay program of the Division of Waterways, and reads as follows:

"For projects for the improvements of rivers, harbors, tidewaters, foreshores and shores along a public beach, as authorized by section eleven of chapter ninety-one of the General Laws, and for construction, reconstruction or repair of drains, to be used in conjunction with any federal funds made available for the purpose; provided, that all expenditures, except the cost of surveys and the preparation of preliminary plans, for work undertaken hereunder, including the cost of engineering during construction, shall be upon condition that at least fifty per cent of the cost is covered by contributions from municipalities or other organizations or individuals except that, in the case of dredging channels for harbor improvements, at least twenty-five per cent of the cost shall be so covered . . . $3,000,000"

You state your question as follows:

"Your particular attention is directed to the phrase '. . . except the cost of surveys and the preparation of preliminary plans. . .,' which phrase has raised a question (discussed in detail below) as to what plans are included within the meaning of the words quoted.

In general, when a Waterways project has been authorized, a consultant is employed to do the preliminary work necessary for the preparation of construction plans and specifications. The consultant then prepares these plans and during the progress of same confers with the Division's engineers who may revise and modify them to insure that certain project requirements are followed. These plans are then presented to the Chief Waterways Engineer for final acceptance and approval. If the Chief Waterways Engineer gives his approval of these construction plans and specifications he signifies this fact by affixing his signature thereto. We have always taken the position that these construction plans and specifications are referred to as preliminary plans and specifications until such time as they are finally approved by the Chief Waterways Engineer. The signed plans are the ones on which bids are received and under which the work is done.

Our question is whether all plan and specification work prior and up to the signing and approval of the final construction plans and specifications on which bids are received should be considered as being within the meaning of the phrase '. . . except the cost of surveys and the preparation of preliminary plans . . .' as contained in item 8262–22 of St. 1961, c. 544, § 2."

Ordinarily the words "preliminary plans" would be taken to mean only plans of such detail as to permit a consideration of the general nature of

the work to be done and an estimation of the costs thereof, as contrasted with the final, accurate, detailed working plans.

However, the meaning of words is to be ascertained from the context in which they are used.

It is to be noted that in Item 8262–22, the words are used as part of a proviso, the material parts of which are "that all expenditures, except the cost of surveys and the preparation of preliminary plans, for work undertaken hereunder . . . shall be upon condition . . ." as stated. In that context it could well be argued as, in effect, you state the division has construed the provision, that all the plans which are a necessary preliminary to the contracting for, and construction of, such projects as are referred to in the item, were intended to be referred to by the Legislature by the words, ". . . preliminary plans, for work undertaken hereunder . . ."

Whether the latter consideration controls the ordinary meaning of the words "preliminary plans," creates an ambiguity which would most appropriately be resolved by the Legislature, and to that end I advise you that in carrying out projects to be financed under the item, you should construe the provision referred to as excluding from the "cost" of a project, as the "cost of . . . the preparation of preliminary plans," the cost of only such preliminary plans as would be included in the ordinary meaning of the words "preliminary plans," as stated above. The contribution to be made will, therefore, be based on a cost including the cost of the preparation of the working plans, and you will continue to exclude any charge for preliminary plans prepared by the department, or any credit to the sponsoring organization for the cost of any preliminary plans prepared by it for the purpose of submitting the project to the department for approval.

The department, or the sponsoring organizations interested, can, if it is deemed advisable, file a bill or bills with the next Legislature for a clarification of the provisions of the item referred to and, in the event that the Legislature should determine that the cost of the preparation of the working plans should also be excluded from the "cost" of construction upon which contributions are to be based, it could make provision for refunds of the amounts by which the contributions of any sponsoring organizations were increased by the department to include the cost of the preparation of working plans.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General

The Department of Mental Health does not have the legal responsibility to store the medical records of a licensed private mental institution for which a receiver was appointed; such records are the property of the receiver and subject to disposition by court order.

Oct. 4, 1961.

Harry C. Solomon, M.D., *Commissioner of Mental Health.*

Dear Sir: — In your letter of recent date relative to the records of the Ring Sanatorium after referring to G. L. c. 123, §§ 3 and 33, relative to licensing of places for the care and treatment of the mentally ill, you refer to the Ring Sanatorium, formerly located in Arlington, licensed by your department. You further state that in February of 1959, this private institution ceased to operate and went out of business after having been in existence for approximately seventy-five years.

You further advise us that upon closing, it was decided that the medical records of this institution should be packaged and stored in a building at the Cushing Hospital where they presently are. Moreover, you state that from time to time you have received numerous requests from individuals, State, Federal and private agencies for information contained in the records.

In the light of the foregoing, you pose the following questions:

"1. Is it the legal responsibility of the Department of Mental Health, upon the closing of a private institution licensed by it, in accordance with statute, to take and store medical records of such an institution?

"2. If your answer to question #1 is in the affirmative, is it then legally proper for the Department of Mental Health to divulge information contained in these records to individuals, State, Federal or private agencies without a court order?

"3. If your answer to question #1 is in the negative, what action, if any, should the Department of Mental Health take pertaining to medical records of an institution licensed by it, in accordance with statute when such an institution terminates its business operation?

"4. If your answer to question #1 is in the negative, what action should be taken regarding the records of Ring Sanatorium presently stored at Cushing Hospital?"

I answer your first question in the negative. Your second question is based upon a positive answer to question number 1. Relative to your third question, I understand that a receiver of the property of the Sanatorium was appointed by the court. Presumably he is the one entitled to the control of its records. If I am correct in assuming that the receiver is currently in control of the assets of the corporation, the records may be transferred to him for proper disposition under order of the court.

Your department has informed me that this institution is not licensed by the Department of Public Health under the provisions of G. L. c. 111, § 71. If it were, the provisions of § 70 of c. 111 could apply to the records you refer to.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

The Metropolitan District Commission could waive a provision of a building construction contract which was not required by statute to be included therein. The Commission could not make a direct payment to a sub-contractor under G. L. c. 30, §§ 39F or 39G, since sub-contractor had filed a lien for an amount greater than that which was due the general contractor.

Oct. 9, 1961.

Hon. Robert F. Murphy, *Commissioner, Metropolitan District Commission.*

Dear Sir: — You have requested the opinion of this office on three questions of law arising out of contract No. 1127.

Your first inquiry is whether the commission, under the provisions of Article XXV of the contract, can waive the apparent informality occasioned by the failure of the general contractor to obtain approval of the painting subcontractor as required by Article XVI.

There is no statutory requirement that the awarding authority give prior approval to individual subcontractors. This requirement originates with the commission and stems from Article XVI of its standard contract. As such, it may be waived by a vote of the commission in accord with Article XXV of the contract.

The answer to your first question is in the affirmative.

Your second question is "Can the commission make the direct payment requested by [the painting subcontractor], and if so, what steps must be taken so that such payment will conform to the law and afford protection to the commission?"

Direct payment by an awarding authority to a subcontractor, "*out of sums payable to the general contractor,*" is permitted by G. L. c. 30, § 39F, under specified conditions and "*such* direct payment . . . shall discharge the obligation of the awarding authority to the general contractor to the extent of such payment." Assuming that all other conditions are met, it does not appear that the awarding authority is holding any sums payable to the general contractor.

Your letter calls attention to a lien filed in accordance with G. L. c. 149, § 29, by the subcontractor seeking the direct payment, in the amount of $97,348. The final estimate is $22,561.87.

The only sum that could be payable to the general contractor is the final estimate — $22,561.87. However, G. L. c. 30, § 39G, applicable to the contract in question, provides that:

". . . The contracting authority shall deduct and retain from payment of said final estimate a sum sufficient to satisfy any and all outstanding claims or liens that have been duly filed against a contractor under the provisions of . . . section twenty-nine of chapter one hundred and forty-nine . . ."

The fact that there is a disputed claim for extra work, and a semi-final estimate may be prepared in lieu of a final estimate, is of no effect for §3 9G further provides:

"In such cases, a semi-final estimate shall be prepared — but subject to the same deductions and retainage as set forth above. . . ."

Since the statutory lien exceeds the amount of the final or semi-final estimate, the commission has no sums payable to the general contractor at the present time. In answer to your second question, if the commission were to make the direct payment requested, there would be no statutory

authority to claim a pro tanto discharge of the commission's obligation to the general contractor on his contract.

Your third question is prefaced, "In the event that your answer to the first question is in the negative. . . ." In view of my affirmative answer to your second question, no response is required to your final inquiry.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By WILLIAM D. QUIGLEY,
Assistant Attorney General.

Under the applicable statutes the Metropolitan District Commission has no obligation to construct sewers in Quincy other than such as may be necessary to enable the city to drain its territory by gravity.

OCT. 11, 1961.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have written me calling my attention to a portion of St. 1899, c. 424, § 8, and stating that Commissioner Herbert of the city of Quincy has requested information of your commission as to what relief can be granted to the city of Quincy for a low area in the vicinity of Bower Road and West Howard Street which he states is urgently in need of sewerage facilities and which cannot be serviced by gravity sewers. The letter concludes by asking the opinion of the Attorney General under the above provision as to whether or not the Metropolitan District Commission has the responsibility to provide relief for this area at the expense of the Metropolitan District so that this area may drain by gravity to the Metropolitan Sewer.

Section 8, above referred to, reads as follows:

"Any city or town, within the limits of which any main sewer shall have been constructed under the provisions of this act, shall connect its local sewers with such main sewer, except as hereinafter provided, subject to the direction and control of said board, and any person, firm or corporation may, subject to the direction, control and regulation, from time to time, of said board, and subject to such terms, conditions and regulations as each city or town may prescribe, connect private drains with such main sewer: *provided*, that the said board shall, without expense to the city of Quincy, make all connections and take and construct such intercepting sewers as may be necessary to enable the city of Quincy to drain by gravity its territory into said metropolitan sewer. The present pumping station and force mains of the city of Quincy shall be taken and paid for by said board of metropolitan sewerage commissioners, and said board shall build and operate such new force main or mains and pumping stations as may be necessary to enable the city of Quincy to drain its sewerage systems into said metropolitan sewer. The sewerage systems of all drainage areas not now drained by the south metropolitan system, which are constructed after the passage of this act, shall be constructed in accordance with the so-called separate system of sewerage."

The responsibilities of the Board of Metropolitan Sewerage Commissioners under c. 424 are now in your commission by virtue of St. 1919, c. 350, § 123. It is a matter of interest as well as of law that the portion of § 8, which is referred to in the letter to this office, is now incorporated almost verbatim in G. L. c. 92, § 2. That section reads as follows:

"Any town, within the limits of which any main sewer under the control of the commission is situated, shall connect its local sewers with such main sewer except as hereinafter provided, subject to the direction, control and regulation of the commission, and any person may, subject thereto and subject to such terms, conditions and regulations as each town may prescribe, connect private drains with such main sewer; provided, that the commission shall, without expense to Quincy, make all connections and take and construct intercepting sewers necessary to enable Quincy to drain by gravity its territory into the metropolitan sewer. The sewerage systems of all drainage areas not now drained by the south metropolitan system shall be constructed in accordance with the so-called separate system of sewage."

It will be observed from a reading of § 8 of c. 424 that the proviso you are interested in is

". . . that the said board shall, without expense to the city of Quincy, make all connections and take and construct such intercepting sewers *as may be necessary to enable the city of Quincy to drain by gravity its territory into said metropolitan sewer. . . .*" (Emphasis supplied.)

The portion of § 8 to which the letter refers now appears in § 2 of c. 92, as I have stated. A careful reading of both sections discloses a legislative intent that your commission shall make connections and construct sewers necessary to enable Quincy to drain *by gravity* its territory into the Metropolitan Sewer.

Commissioner Herbert, you state, has requested information as to what relief your commission can give to the city of Quincy for a low area which cannot be serviced by gravity sewers. The proviso in §§ 8 and 2 with which we are concerned indicates a legislative intent to authorize your commission to make, without expense to Quincy, all connections and construct intercepting sewers *necessary* to enable Quincy to drain *by gravity* its territory into the Metropolitan Sewer. The obligation of the commission in this respect has not been changed in the last sixty years as shown by the repetition found in the 1899 legislation and in the current § 2 of G. L. c. 92.

It is assumed from the letter of the commissioner that the sewers needed to meet the demands of the city of Quincy cannot be gravity sewers. Your commission is not authorized, in my opinion, to undertake expense under the provisions we have referred to except such as is *necessary* to enable Quincy to drain by gravity its territory into the Metropolitan Sewer. There is no other duty upon your commission.

This office, of course, must interpret statutes as enacted. Omissions cannot be supplied by this department. It may well be that further legislation will be found necessary to achieve the desired result.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

The conduct of sporting events of any type being permitted on any legal holiday under the provisions of G. L. c. 136, § 37, high school football games may be played on Thanksgiving morning.

Oct. 17, 1961.

Hon. Owen B. Kiernan, *Commissioner of Education.*

Dear Sir: — In your letter of recent date, relative to "Thanksgiving Day," after referring to G. L. c. 4, § 7, cl. 18th, and G. L. c. 136, § 21, you state that many high schools in the Commonwealth play their most important and traditional rivals on Thanksgiving morning and that this is a practice which has been in existence for a great many years. You then pose the following question:

"I would greatly appreciate receiving an opinion from you as soon as possible, whether § 37 of c. 136 may be so interpreted so that one-thirty and six-thirty post meridian restriction of § 21 of c. 136 may be disregarded. In other words, can the high schools play football on Thanksgiving morning, or are they limited to the hours of one-thirty and six-thirty post meridian?"

As you are aware, G. L. c. 136, §§ 21 and 25, inclusive, provide for certain sports and games on the Lord's day in such municipalities as accept those provisions in the manner provided by § 21. Moreover, certain amateur sports are permitted in certain cities and towns on the Lord's day in accordance with the provisions of G. L. c. 136, §§ 26 to 32, inclusive.

As you are also doubtless aware, said c. 136 was amended by the provisions of St. 1960, c. 812, entitled "AN ACT RELATIVE TO THE OBSERVANCE OF LEGAL HOLIDAYS WITHIN THE COMMONWEALTH." Section 3 of c. 812 adds five new sections to c. 136. Said new sections are numbered 33, 34, 35, 36 and 37. This new § 33, under the caption "LEGAL HOLIDAYS," is as follows:

"The provisions of this chapter shall apply from midnight to midnight on each of the following holidays, except as provided in section thirty-seven, and the public offices shall be closed on all of said days: January first, May thirtieth, July fourth, First Monday of September (by amendment, Columbus Day), November eleventh, Thanksgiving Day, and Christmas Day."

The new § 37, still under the caption "LEGAL HOLIDAYS," provides that

"*Notwithstanding the provisions of this chapter (referring, of course, to chapter 136), sporting events of any type, including those authorized under chapter one hundred and twenty-eight A, may be conducted on any legal holiday*, and any business licensed under chapter one hundred and thirty-eight may be conducted in accordance with the provisions of said chapter on any such day. Hunting, if otherwise lawful, shall not be prohibited on November eleventh. Florist shops may be kept open all day on May thirtieth." (Emphasis supplied.)

There follow two more paragraphs not now germane.

Section 21 of c. 136 refers to outdoor sports on the Lord's day. The new § 37 provides that "sporting events of any type . . . may be conducted on any *legal holiday*." Thanksgiving day is a legal holiday.

Under the provisions of the new § 37, I am of the opinion that football games may be conducted on Thanksgiving morning as usual. I, therefore, answer your question in the affirmative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

By FRED W. FISHER,
Assistant Attorney General.

The Commissioner of Public Safety has authority to license dancing acts on certain holidays under the conditions applicable to Sunday.

OCT. 24, 1961.

HON. FRANK S. GILES, *Commissioner of Public Safety.*

DEAR SIR: — In your recent communication you requested my opinion "as to whether dancing will be approved for (November 11th) by (your) department, especially with regard to tap dancing, acrobatic dancing, ballet dancing and musical comedies." Your letter explains that your "department has interpreted G. L. c. 136, § 2, as amended, to include the prohibition of *any* dancing on Sunday *including dancing acts that are part of a so-called entertainment.*" (Emphasis supplied.)

By virtue of § 1 of St. 1960, c. 812, entitled "AN ACT RELATIVE TO THE OBSERVANCE OF LEGAL HOLIDAYS WITHIN THE COMMONWEALTH," certain dates, including November 11th, were declared to be legal holidays, the observance of which was to be governed as provided in c. 136 except as otherwise specifically stated therein.

Section 3 of said St. 1960, c. 812, added five sections to G. L. c. 136 under the caption "LEGAL HOLIDAYS." Your question deals with the last of these five sections, now incorporated as § 37 of c. 136, and more particularly with the last paragraph thereof, which states:

"*Any entertainment*, amusement or enterprise mentioned in sections four, four A and four B may be conducted or operated on any such legal holiday, *provided*, however, that the provisions for *licensing and the hours of operation as contained in said sections shall apply on May thirtieth, November eleventh and Christmas Day.* (Emphasis supplied.)

I am unable to find, as you suggest, any reference in c. 666 of the Acts of 1960, which extends the Lord's day laws in the area of entertainment, to May thirtieth, November eleventh and December twenty-fifth. However, this extension was made in the act to which I have above referred.

By virtue of the last paragraph of § 37 quoted above, "any entertainment" mentioned in § 4 may be licensed on November eleventh as provided in said § 4. That section provides, in effect, that if the "proposed entertainment shall have been approved in writing by the commissioner of public safety *as being in keeping with the character of the day and not inconsistent with its due observance*," the mayor or selectmen, as the case may be, may grant to an applicant "a license to hold on the Lord's day" such public entertainment. (Emphasis supplied.)

Among other activities not here pertinent, § 2 of c. 136 to which you

refer, excludes from its broad prohibitions "dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing . . ." Accordingly, being present at or taking part in such dancing is specifically permitted on November eleventh and falls without the scope of the approval requirement and licensing provision of § 4.

More imminently, your inquiry deals, I assume, with the duty devolving upon you by virtue of the approval requirement of § 4 regarding entertainment activities conducted in restaurants, hotels, nightclubs, and the like, where such entertainment takes the form of tap dancing, acrobatic dancing and ballet dancing, and also where such dancing may be performed in conjunction with musical comedies.

In view of the specific exception to dancing quoted above, it must be assumed that dancing other than as specifically excepted falls within the broad prohibition against "public diversions" in § 2. Section 2, however, grants a further exception for those present at "a public entertainment duly licensed as provided in section four," and again for those "(taking) part in any . . . public diversion, *except as aforesaid*." The italicized clause has among its antecedents the reference to duly licensed public entertainment. Little is required to regard dancing, as you have described it, as a form of public entertainment; your communication is based on this assumption with which I am in accord.

Accordingly, it is my opinion that "dancing acts that are part of a so-called entertainment" are not prohibited on November eleventh by § 2 as a matter of law. The duty devolves upon you, under the approval requirement of § 4, to determine whether "the proposed entertainment . . . is in keeping with the character of the day (November eleventh) and not inconsistent with its due observance," mindful of the further authority delegated to you thereby to suspend, revoke or annul such license upon the same considerations, after notice and hearing.

The following language in *Mosey Cafe, Inc.* v. *Mayor of Boston*, 338 Mass. 207, 212, referring to c. 136, § 4, may serve you as a guide in this respect: "No censorship is authorized. The licensing authority cannot become a censor. He is not without standards for the granting or denial of a license. In his quasi judicial capacity he must act reasonably and not whimsically. His duty includes action for the preservation of public order in public entertainment. . . ."

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General*,

By EUGENE G. PANARESE,
Assistant Attorney General.

An autopsy should not be performed on the body of a deceased patient at a State hospital unless all the next of kin consent.

OCT. 25, 1961.

MR. JOHN L. QUIGLEY, *Commandant, Soldiers' Home, Chelsea.*

DEAR SIR: — You have inquired whether or not you have the right to permit an autopsy performed on a deceased patient where the next of kin consists of a son and daughter and one consents to the autopsy but the

other does not. In the situation you refer to, the consenting party was listed as "next of kin" for notification, presumably by the patient upon entrance to your institution.

Our Supreme Judicial Court, most recently in the case of *Kelley* v. *Post Publishing Co.*, 327 Mass. 275, 277, has said that one who intentionally mistreats the body of a dead person is liable in tort to the member of the family of such person who is entitled to the disposition of the body. This is the same position adopted by the *Restatement of Torts*, § 868. In *Sheehan* v. *Commercial Travelers Ass'n*, 283 Mass. 543 at 553, it was said:

"The right of possession of a dead body . . . for the purpose of an autopsy, . . . is vested, at least in the absence of a different provision by the deceased, in the surviving husband, wife, or next of kin."

I am unaware of any authority which settles the issue you raise where some of the next of kin but not all consent to the autopsy. It is my opinion, therefore, that it would be *unwise* to permit an autopsy unless all the next of kin grant permission for it.

This opinion does not, of course, apply to those situations referred to in G. L. c. 38, § 6, wherein a State Medical Examiner may be authorized or required to perform an autopsy nor to those referred to in G. L. c. 113.

An opinion was sent to you relative to the same subject matter under date of December 31, 1956.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

G. L. c. 30, § 21, prohibiting the receipt of two salaries from the Commonwealth does not prevent a salaried state employee being employed in another state agency where his compensation is not salary but is in the nature of wages for special services.

OCT. 26, 1961.

HON. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — You have requested a formal opinion as to whether a part-time salaried employee in your department may be compensated for services rendered to another State agency. It appears that the compensation paid to the employee in question for the services rendered to the other State agency is not in the nature of a regular salary, but is compensation for services rendered in connection with specific matters handled.

A series of opinions from this office, the latest of which is reported in Attorney General's Report, 1956, p. 42, established the principle that the provisions of G. L. c. 30, § 21, do not prohibit a person receiving a "salary" from the Commonwealth for services in one department from being employed by another State agency where the compensation paid for the services rendered to the second agency is not in the nature of a salary, but is in the nature of "wages" for special services from time to time performed. I am enclosing herewith a copy of the opinion cited. You will note that the prior opinions on the question are fully reviewed therein.

Inasmuch as the person to whom you refer is only a part-time employee in your department, the possible conflict of working hours is less than in

the case of full-time employment, and the cautionary statement made in the opinion above cited that the special services for which it was there held compensation could be paid must be "in the nature of overtime work," would not, therefore, be as applicable to such an employee as it would be if he were a full-time employee in your department.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

Under G. L. c. 91, § 11 the Division of Waterways could not construct a replacement for a privately-owned footbridge supplying access to a private industrial site, not shown to be necessary to a stream improvement project. The requirements of public ownership of works under the section would preclude construction of the bridge on private property; and fact that bridge spans tidal waters, and the taking of easements by a town, does not justify constructing a bridge to connect properties of a private owner.

OCT. 30, 1961.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have requested an opinion as to whether the Division of Waterways has the right to construct a footbridge across Herring Brook in the town of Weymouth.

Your letter states that a privately-owned bridge presently spans the brook and provides access to an industrial site. Proposed stream improvements to be undertaken by the Division of Waterways will render the existing bridge unsuitable, and if the bridge were to be replaced, a structure with a longer span and larger hydraulic capacity would be required. No inquiry is raised as to the liability of the Commonwealth, acting through its Department of Public Works and its Division of Waterways, for the removal of, or damage to, the existing, privately-owned bridge. Your specific inquiry concerns the right of the division to construct a new bridge and its ownership thereafter.

The Division of Waterways is authorized to expend its appropriation for projects and improvements "as authorized by section eleven of chapter ninety-one of the General Laws" (*e.g.* St. 1961, c. 544, § 2, Item 8262–22). General Laws, c. 91, § 11, provides:

"The department shall undertake such construction and work for the improvement, development, maintenance and protection of tidal and non-tidal rivers and streams . . . as it deems reasonable and proper. . . . The department, in pursuance of the work authorized, may construct . . . bridges . . . and may do such other incidental work as may be deemed necessary for the improvement and safety of waterways."

The reasonableness and propriety of a stream improvement is a determination to be made solely by the department, but there is no authority under G. L. c. 91, § 11, for the independent construction of a bridge. On the contrary, this section provides authority only for the construction of such bridges as are incidental to the proposed stream improvement, etc., and are necessary to the improvement and safety of the waterway.

You were previously advised in an opinion dated November 21, 1958, that the department "has no right to expend public monies for an unneces-

sary improvement in the nature of a vehicular bridge merely because it will be an addition to the town if it is not necessarily incidental to the improvement work on the Brook." It was further stated in that opinion that whether the proposed bridge is reasonably necessary to complete the improvement work is an engineering and not a legal problem.

In the instant case, it is my opinion that the department has no right under G. L. c. 91, § 11, to construct a footbridge merely as a replacement for the existing footbridge which must be removed, unless the construction of the new bridge is incidental to, and necessary for, the construction of the proposed improvement or the safety of the waterway. It appears from your letter that the only sense in which the proposed footbridge can be considered necessary is to supply access to a private industrial site; it does not appear that the bridge is necessary, in an engineering sense, to the accomplishment of the stream improvement.

Furthermore, if the department should determine that the construction of the footbridge is necessary, in an engineering sense, in order to accomplish the stream improvement, there is no authority in G. L. c. 91, § 11, to construct the bridge on private property. You were advised by an opinion dated January 20, 1960, that one of the essential requirements for construction or work under this section is public ownership. (See also Attorney General's Report, 1954, pp. 53–54, to the same effect.)

The fact that the proposed bridge would span tidal waters and public property is not sufficient to constitute public ownership, and the fact that the town has taken the easement to which you refer is not sufficient to justify the construction by the department under G. L. c. 91, § 11, of a footbridge to connect properties of a private owner.

In view of the negative answer to your first question, no response is required to your second inquiry.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By William D. Quigley,
Assistant Attorney General.

Materials in excess of those originally estimated which are required to complete a bridge under a state highway contract are to be paid for at unit prices as an "Alteration," and not at cost as "Extra Work," and the provision of the standard specifications disclaiming any guarantee of estimates is in accord.

Oct. 31, 1961.

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

Dear Sir: — You have requested an opinion as to a payment for expenses incurred by Warner Brothers, Inc., during construction of a project in the town of Lee.

Your letter states that a quantity of steel pilings in excess of the original estimate was needed to complete the project. Because of a steel strike, the additional steel pilings had to be purchased at .0945 cents per pound or at a cost of .027 cents per pound more than those originally purchased.

Your question is whether the department is required to recompense the

contractor for the payment of .027 cents per pound on the 50,800 additional pounds of steel pilings purchased.

In answer to your question, it is first necessary to determine whether the additional work was an alteration or extra work. The question should be determined by reference to the contract which incorporates by reference the following definitions in Division I of the "Standard Specifications for Highways and Bridges" 1953 Ed.

"Alteration" — "Change in the form or character of any of the work done or to be done."

"Extra Work" — "Work or materials for which no price agreement is contained in the contract and which is deemed necessary for the proper completion of the improvement."

Broadly, the definition of alteration quoted above, must be taken to refer to those things which lie within the scope of the work "done or to be done" as defined in the particular contract. By contrast, the definition of extra work carries the implication that the work in question and not merely the amount of it, was not originally anticipated, and was not called for by the plans and specifications but was deemed necessary to be added in order to complete the project.

Opinions of the Massachusetts Supreme Judicial Court agree in the general definition of an alteration as a modification in some details, leaving the general purpose and effect of the original contract intact. See *Morse* v. *Boston*, 253 Mass. 247. An extra, however, is generally defined as work not contemplated or required by the original contract and which the department could not require the contractor to perform without separate, additional compensation as in *Russo* v. *Charles I. Hosmer, Inc.*, 312 Mass. 231.

In this instance, it was clearly contemplated and intended by the parties to the contract that the contractor supply a sufficient quantity of steel pilings to complete the project. The additional work was in the nature of a modification within the scope of the original contract. Therefore, the additional work involved was an alteration and not extra work.

The work in this contract was to be done according to the "Standard Specifications for Highways and Bridges" 1953 Ed. (amendments included). The rules governing the payments for alterations in construction contracts is stated in Article 79 of those specifications. The article provides in part: "An increase in quantities of work to be performed will be paid for at the contract unit price for the actual work done in the same manner as if such work had been included in the original estimated quantities." The provision makes it clear that the unit price to be paid for the additional quantity of steel pilings should be the same as that bid for the quantity of pilings originally estimated. Thus, while the department must recompense the contractor for the additional work at the unit price of .0675 cents per pound, it need not pay him at the increased price of .0945 cents per pound. The department is not, therefore, liable for the payment of .027 cents per pound on the additional 50,880 pounds.

You make reference to the fact that the boring data furnished was very misleading. Article 4 of the Standard Specifications declares that: "Statements as to conditions under which the work is to be performed, including plans, surveys, measurements, calculations, estimates, borings, etc., are made solely to furnish a basis for comparison of bids, and the Party of the First Part does not guarantee or represent that they are even approximately correct. The contractor must satisfy himself by his own investi-

gation and research regarding all conditions affecting the work to be done and labor and material needed, and make his bid in sole reliance thereon." This provision makes the complaint about misleading boring data immaterial since it indicates that the contractor should not rely upon the estimates furnished by the department.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By WILLIAM D. QUIGLEY,
Assistant Attorney General.

The statutes requiring registration as a pharmacist to dispense drugs, and regulations thereunder, are applicable to such dispensing in state institutions.

OCT. 31, 1961.

MR. JOHN L. QUIGLEY, *Commandant Soldiers' Home, Chelsea, Mass.*

DEAR SIR: — You have recently inquired what the effect of the Proposed New Rules and Regulations of Professional Conduct of Pharmacists being promulgated by the Board of Registration in Pharmacy would be on your hospital pharmacy and your pharmacist. You are particularly concerned with the following proposed rules:

"4. The registered pharmacist shall not substitute any other product in place of brand-named drugs prescribed, unless approval is obtained from the prescriber at the time of dispensing.

"22. A registered pharmacist connected with and employed by a hospital or clinic shall only dispense medicine or drugs to inpatients, and to out-patients who are under the immediate treatment of the hospital or clinic."

It should be noted that the Proposed New Rules and Regulations of Professional Conduct of Pharmacists were filed with the State Secretary on September 29, 1961, pursuant to G. L. c. 30A, § 5, and said statute provides that they become effective on that date since no other date has been specified by the board.

The Board of Trustees of the Soldiers' Home in Massachusetts is granted the same powers in regard to management and control as the trustees of State hospitals. G. L. c. 6, § 41. Trustees of State hospitals may appoint superintendents who in turn are authorized to appoint "assistant physicians and necessary subordinate officers and other persons." G. L. c. 123, § 28.

The statutes relating to narcotic drugs and the dispensing of drugs, medicines, chemicals, or poisons for medicinal purposes would seem to require the employment of a pharmacist registered under the provisions of G. L. c. 112 in a private hospital that maintains its own pharmacy. (G. L. c. 94, §§ 197–217; c. 112, § 30).

The Board of Registration in Pharmacy, in promulgating the above-referred to rules and regulations, presumably acted pursuant to G. L. c. 112, § 42A, as most recently amended in 1960. That section reads in part:

"The board may by rule or regulation adopt, amend or repeal rules of professional conduct. Every person who holds a certificate, license, registration or permit to practice pharmacy or engage in the retail drug business

in this commonwealth shall be governed and controlled by the rules and regulations of professional conduct adopted by the board."

While, as a general rule, statutes of a general nature do not apply to the State unless expressly stated (see Attorney General's Report, 1958, pp. 61, 65), there are many exceptions to this rule which require us to examine the purposes of the statute. It seems to me that the object of the statutes relating to narcotic drugs and the dispensing of medicines is the protection of the citizenry from the evils that may result from untrained or improper persons having custody of and dispensing the same. I therefore conclude that the Legislature intended the statutes regarding the care, custody and dispensation of narcotic drugs and medicines to apply to State hospitals and other institutions. This being so, if you maintain a pharmacy, you must employ a registered pharmacist and his professional conduct will be governed by the rules and regulations promulgated by the Board of Registration in Pharmacy.

The Attorney General in 1913 rendered a similar opinion when asked whether physicians practicing medicine in State hospitals must be registered in accordance with State law. IV Op. Atty. Gen. 432. He stated at page 433:

"The statute as to registration of physicians does not in terms impose any penalty or obligation upon the employer, but applies rather to the person who attempts to practise medicine. Any effect upon the State by its general enforcement in all cases, including employees in public institutions, would be merely an indirect result of such enforcement.

"The object of these statutes is, of course, the promotion of the public good and the protection of the citizens against the evils naturally resulting from the attempts of unskilled persons to practise medicine. No good reason suggests itself why the protection thus afforded should be less to those citizens who are cared for in State institutions than to those who are not."

I might, in closing, refer you to § 4 of c. 30A which provides that any person may petition an agency, in this case the Board of Registration in Pharmacy, requesting the adoption, repeal or amendment of any regulation and may accompany his petition with such data, views and argument as he thinks pertinent.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General*,

By Fred W. Fisher,
Assistant Attorney General.

An agreement for the construction by the State Department of Public Works of new water wells to replace those of a city damaged by the construction of a State highway did not authorize the Department to supply chemicals required to make water potable.

Nov. 1, 1961.

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

Dear Sir: — You have requested an opinion as to whether there is any legal barrier to an agreement by the department with the city of Lowell for the department to supply chemicals for a period of one year for the operation of new water wells in that city.

It appears from your letter that the new wells are part of new water facilities being constructed by your department pursuant to an agreement dated March 8, 1960, between the department and the city of Lowell Department of Public Works. The construction of a State highway through the "City's Cook Well Field Water Supply" made the construction of replacement facilities necessary. It appears from the collateral material you submitted with your request that the new wells have developed a high sulphide content and that the chemicals in question are required to render the water potable.

The agreement referred to above, dated March 18, 1960, contemplated the possibility of a change in the quality of the city's water supply by the new construction. The provision entitled "*Release of Damage*" provides:

". . . In consideration of the new water facilities the city hereby agrees: . . .

"3. To relinquish any and all claims for damage which may be attributed to the effect on the quality and quantity of the city's water supply by the construction of the State highway and related construction."

By the same agreement, the department agreed to carry the entire cost of preparing plans and specifications and the cost of construction. The city agreed that upon "completion of the new water facilities," it will assume the responsibility for the maintenance thereof and the entire cost pertaining to the operation and maintenance. Unless a year's supply of chemicals is to be considered part of the construction of facilities rather than part of the cost of maintenance, then your department has no obligation to supply such chemicals. When the new water facilities are completed according to the plans and specifications, by the terms of the agreement, it will become the duty of the city to accept the facilities, assume the cost of maintenance, and thereby release all claims attributable to the effect on the quality of the city's water supply by the construction of the State highway.

"A 'facility' is a thing that promotes the ease of any action, operation, transaction, or course of conduct . . ." (*Coldwell* v. *McMillan*, 224 S. C., 150.) The equipment necessary or convenient to the process of adding chemicals to the water supply may be considered "facilities." The chemicals themselves do nothing to promote the ease of the process and cannot, within the common usage of the term, be considered "facilities."

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By William D. Quigley,
Assistant Attorney General.

The Competitive Bidding Law prevents negotiating with the low bidder on a construction contract for a reduction of an unbalanced bid on a unit item when State funds only are involved, but not when Federal funds also are involved and G. L. c. 81, § 30, is applicable.

Nov. 2, 1961.

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

Dear Sir: — You have requested an opinion concerning the renegotiation of unit prices prior to the award and execution of contracts.

It appears from the example in your letter that the department occasionally receives an unbalanced bid — that is, when there is a small estimated quantity for a given item, the contractor may submit an unreasonably large unit price for that item with a minimal effect on the total bid price. If, by chance, or by unexpected circumstances, the original estimate is insufficient, the successful bidder will make an unreasonably large profit on that item at the expense of the Commonwealth.

You propose to avoid such speculation by comparing the low bidder's unit prices against engineering estimates of fair prices and then, prior to the award of the contract, renegotiating unit prices which appear to be out of line.

Your first question is:

"1. On a project financed only with local funds, may the department before the award and execution of an agreement renegotiate any of the items?"

General Laws, c. 29, § 8A, requires that public works contracts of one thousand dollars or over be awarded on the basis of free competitive bidding. In construing this section, the Supreme Judicial Court has said:

"Statutes of this general character are designed 'to establish genuine and open competition after due public advertisement in the letting of contracts . . . to prevent favoritism in awarding such contracts and to secure honest methods of letting contracts in the public interests.' . . . In the *Morse* case, 253 Mass. 247, 252, it was said that such 'statutes must be interpreted, if reasonably possible, so as to effectuate the purpose of the framers' and 'every presumption is to be indulged that the General Court intended to put in force . . . legislation effectual to remedy the evil at which it appears to be aimed.' "

Pacella v. *Metropolitan District Commission*, 339 Mass. 338, at 342.

It has been held that there must be strict compliance with the statutory requirements of competitive bidding laws applicable to building construction contracts (*Poorvu Construction Co. Inc.* v. *Nelson Electrical Co. Inc.*, 335 Mass. 545), and that a benefit to the Commonwealth is not a ground for ignoring the bid statute. (See *Gifford* v. *Commissioner of Public Health*, 328 Mass. 608, 616–617; *East Side Construction Co. Inc.* v. *Adams*, 329 Mass. 347.)

The power to negotiate a unit price different from the bid originally submitted against the declared purpose of the bid statute — "to secure honest methods of letting contracts." The fact that the department is desirous of exercising a power to negotiate prices for the purpose of securing lower unit prices for the benefit of the Commonwealth will not justify the practice.

A recent opinion rendered to the Metropolitan District Commission stated, in effect, that the commission could not renegotiate unit prices

after the execution of the contract without risking a violation of the competitive bidding statute. The fact that the department seeks to renegotiate a submitted unit price bid prior to the award and execution of the contract is not a controlling distinction.

It is my opinion that in the absence of permissive legislation, contracts, financed wholly with local funds, must be awarded in accord with prices established by competitive bidding rather than by negotiation.

Your second inquiry is:

"2. On a project where there are Federal funds involved, may the department before the award and execution of an agreement renegotiate any of the items?"

General Laws, c. 81, § 30, provides:

"The department may make all contracts and agreements and do all other things necessary to co-operate with the United States in the construction and maintenance of highways . . . and may make any agreements or contracts that may be required to secure federal aid in the construction of highways . . ."

If the renegotiation of unit prices is necessary to co-operate with the United States "or required to secure Federal aid," the department may award contracts on the basis of such negotiated prices.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The furnishing by a town of transportation of a pupil to a private school in another town is required only when similar transportation is being furnished to pupils in the public schools in the same grade.

NOV. 2, 1961.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — In your letter of recent date you request an opinion relative to the subject of reimbursement for school transportation to the town of Seekonk.

You state that the town of Seekonk does not have a four-year public high school but that under the provisions of G. L. c. 71, § 6, it sends pupils in grades 10, 11 and 12 outside the town of Seekonk for which it pays tuition and transportation. Seekonk, you advise us, maintains grades 1 through 9 in the town, and the parents are requesting transportation under G. L. c. 76, § 1, for children of residents of the town who go to a private school outside of Seekonk in grade 9. After calling our attention to the decision of the Supreme Court in the case of *Quinn* v. *School Committee of Plymouth*, 332 Mass. 410, and the language of the opinion in that case:

"(2) to provide transportation to the Sacred Heart School in Kingston for pupils in grades III through VI to the extent that transportation is provided by the committee for elementary school pupils in the public school in Bourne,"

you pose the following question:

"Does this mean Seekonk would only have to provide transportation to private schools in grades 10, 11 and 12?"

As you point out in your letter, the Supreme Court in the case of *Quinn* v. *School Committee of Plymouth*, 332 Mass. 410, has applied G. L. c. 76, § 1, to a similar situation. I believe that the court in that case requires a grade by grade comparison of the treatment of public school pupils to private school students with respect to transportation costs. Since, therefore, no public school students are transported to grade 9 outside the town, in my opinion, private school students in this grade are not entitled to such transportation.

In my opinion, therefore, the answer to your question is in the affirmative.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The provisions of G. L. c. 40, § 21(16) authorizing town by-laws for removing vehicles impeding snow plowing were not repealed by the enactment of G. L. c. 40, § 22.

Nov. 2, 1961.

MR. EDWARD J. McCARTHY, *Chief Engineer, Department of Public Works.*

DEAR SIR: — In your recent letter you refer to the letter which you have received from the town counsel of the town of Williamstown relative to municipal action under the so-called "towing law" (St. 1961, c. 322).

Under the provisions of G. L. c. 40, § 21(16), it is provided that towns may make *by-laws*

"For authorizing the superintendent of streets or other officer having charge of ways, for the purpose of removing or plowing snow, or removing ice, from any way, to remove, or cause to be removed, to some convenient place, including in such term a public garage, any vehicle interfering with such work, and for imposing liability for the cost of such removal, and of the storage charges, if any, resulting therefrom, upon the owner of such vehicle."

You will note that this provision authorizes the enactment of town *by-laws.*

General Laws c. 40, § 22, authorizes, as you know, municipal ordinances or *by-laws,* or rules and orders by the board of aldermen or the selectmen "for the regulation of carriages and vehicles used therein." As you are also well aware, § 21(16) is a statute of state-wide application.

Chapter 322 of the Acts of 1961, inserting a new § 22D in G. L. c. 40, is a local option statute, so called, becoming operative only in municipalities which specifically accept its provisions. Moreover, it does not attempt to authorize the enactment of ordinances or by-laws which are ordinarily dealt with by the legislative branches of the municipalities but provides that:

". . . the city council or board of selectmen or . . . some other board or commission . . . empowered to establish traffic regulations . . . may adopt, amend, alter or repeal rules and regulations . . . to remove . . . any vehicle parked or standing on any part of any way . . . in such a manner as to impede in any way the removal or plowing of snow or ice

or in violation of any rule or regulation which prohibits the parking or standing of all vehicles on such ways . . ." (Emphasis supplied.)
Moreover, there is no express repealer provision in c. 322.

It is, as you know, a well-settled rule of statutory construction that a statute is not to be deemed to repeal or supersede a prior statute in whole or in part in the absence of express words to that effect or of clear implication. *Mayor of Haverhill* v. *Water Commissioners of Haverhill*, 320 Mass. 63, 68.

It is also a principle of statutory interpretation that statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both unless there be some positive repugnancy between them. *Ryan* v. *Marlborough*, 318 Mass. 610, 613.

We have, then, in effect a statutory provision, G. L. c. 40, § 21(16), authorizing towns to enact by-laws for the purpose of removing motor vehicles interfering with the removal or plowing of snow or removal of ice from the public ways. This provision, as I have stated, is of state-wide application and has been on our statute books for about twenty years.

The new § 22D of c. 40, inserted by St. 1961, c. 322, is simply a local option statute providing for traffic regulations as distinguished from by-laws authorizing the removal of motor vehicles impeding the removal or plowing of snow or ice and also in violation of any parking rules or regulations.

In view of the absence of any repealer provision in the new § 22D and the fact that it deals with, in part at least, a new and different subject matter from § 21(16), I am not satisfied that the new § 22D repeals the present § 21(16).

In the light of the foregoing, I am in accord with your conclusion that proper action under § 21(16) by a municipality remains effective without the necessity of further action under the new § 22D. While I am of the opinion that both § 21(16) and the new § 22D are in force and effect, I am in agreement with you that municipalities in the future desiring to legislate concerning the towing of motor vehicles should, as a practical matter, act under the new § 22D.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Commissioner of Public Safety has the authority, subject to appropriation, to pay installation charges for teletypewriter equipment in the headquarters and sub-stations of the State Police.

Nov. 2, 1961.

HON. FRANK S. GILES, *Commissioner of Public Safety.*

DEAR SIR: — You have recently requested my opinion as to whether you, as Commissioner of Public Safety and Chairman of the Board of Teletypewriter Regulations, by authority of St. 1953, c. 474, may authorize installation charges for the expansion of your Teletype Communication System for a more efficient and modern system which will allow for continued growth.

In your letter you state that the Communications Analyst in the office of the Commissioner of Administration and Finance, has objected to the

payment of installation charges proposed by the New England Telephone and Telegraph Company on two grounds:

(1) The Commonwealth paid for such charges when the present equipment was installed.

(2) Under St. 1953, c. 474, the Commissioner of Public Safety is authorized only to pay rental fees.

Your request for an opinion properly relates only to the second objection since the first is one which does not concern your legal authority but rather your business judgment.

The pertinent portions of St. 1953, c. 474, are as follows:

"The commissioner of public safety is hereby authorized to provide for the installation, operation and maintenance of a teletypewriter communication system at the general headquarters of the state police, and at such substations or detached posts thereof as he may designate, to insure the prompt collection, exchange, dissemination and distribution of such information as may be necessary for the efficient administration and operation of the state police, and to connect said system directly or indirectly with similar systems in this or adjoining states. . . .

". . . Any law enforcement agency of the United States government or of any city or town within the commonwealth may use, or make teletypewriter connection with, the system herein provided. . . .

"The commonwealth shall pay all rental fees for necessary wire or circuit mileage required to convert teletypewriter communication stations of state departments or divisions, and of city and town law enforcement agencies with the teletypewriter communication system authorized herein."

It is to be noted that this act was passed in 1953 at a time when there was already existing a sytem of teletypewriter communication in the State Police headquarters and substations. The provision for payment by the Commonwealth of rental fees is obviously broader in scope than the reference to "installation, operation and maintenance"; whereas rental fees are to be paid by the Commonwealth for all State agencies and all participating cities and towns, the Commissioner of Public Safety is authorized to "provide for" installation, operation and maintenance only in the State Police headquarters and substations.

Therefore, if you are authorized to incur expenses for installation it would be only for facilities in the State Police headquarters and substations. In my opinion, the words "provide for the installation, operation and maintenance" do authorize you to make expenditures for those purposes. The words "to provide" have been construed to include the power to purchase. *Swartz* v. *Lake County Com'rs.* 63 N.E. 31 (Ind.), *City of North Muskegon* v. *Rodgers*, 154 N.W. 71 (Mich.). See also: *McQuade* v. *N. Y. Central Rd. Co.*, 320 Mass. 35.

If, in your judgment, it becomes necessary to pay for installation charges for the expansion and modernization of the State Teletypewriter Communication System, in my opinion, you are authorized to do so provided the charges are restricted to State Police headquarters and substation installations and provided also your department has an appropriation for such purposes. G. L. c. 29, § 26.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Returns to the Excise Tax Bureau of monthly sales, etc., of motor fuels and alcoholic beverages, are "public records", and disclosure of the contents is not prohibited by the provision G. L. c. 268A, "Code of Ethics" as to disclosing confidential information.

Nov. 10, 1961.

Hon. Guy J. Rizzotto, *Commissioner of Corporations and Taxation.*

Dear Sir: — In your letter of recent date you refer to G. L. c. 268A, inserted by St. 1961, c. 610, entitled "Code of Ethics."

You state that it has been the practice of your Excise Tax Bureau and that of its immediate predecessor the Division of Excise Taxes to issue statistics dealing with monthly sales of alcoholic beverages and gasoline. You further state that the names of the respective taxpayers, with their individual monthly sales, appear in a publication set up for distribution to the members of the various associations in the industries. The prior commissioner ruled that in view of the fact that G. L. c. 62, relating to income taxes, G. L. c. 63, concerning taxation of corporations, and G. L. c. 65, covering taxation of legacies and successions, contain provisions specifically limiting the right of examination of returns and the significant omission of such provisions in c. 64A, relating to taxation of sales of gasoline and § 21 of c. 138, referring to taxation of sales of alcoholic beverages, the intent of the General Court was that the latter were not to be regarded in the same light as the former and that information could be given out as indicated.

Moreover, you state that no one has questioned the propriety of the Commissioner's procedure in divulging the above information. After calling my attention to § 4(*c*) of c. 268A, you request my opinion as to whether or not the information contained in the returns filed under G. L. c. 64A and G. L. c. 138, § 21, is to be regarded as confidential.

General Laws c. 64A, § 4, provides for the monthly filing of returns under oath, on forms to be approved by the State Tax Commission, stating the number of gallons of fuel sold by the taxpayer in the Commonwealth during the preceding calendar month, and such return shall contain or be accompanied by such further information as the commissioner shall require. Section 4 also provides that every unclassified importer shall, on or before the last day of each month, file with the commissioner a return under oath stating the number of gallons of fuel imported or caused to be imported into the Commonwealth during the preceding calendar month and shall contain such other information as the commissioner shall require.

General Laws c. 138, § 21, provides that every person subject to that section shall keep a true and accurate account of all alcoholic beverages or alcohol sold by him other than malt beverages, imported into the Commonwealth by him, and a like account of all malt beverages imported into the Commonwealth by him, and shall make a return thereof to the Commissioner of Corporations and Taxation within twenty days after the last day of each month covering such sales and importations by him during such month.

Chapter 610 of the Acts of 1961 inserts a new c. 268A in the General Laws entitled "Code of Ethics," which, after § 1 entitled "Declaration of Interest," § 2 entitled "Definitions," and § 3 entitled "Rule with respect to conflicts of interest," takes up under § 4 the subject of "Standards." In paragraph (*c*) it is provided

"No officer or employee of an agency should disclose confidential infor-

mation acquired by him in the course of his official duties nor use such information to further his personal interests."

General Laws c. 4, § 7, twenty-sixth, provides that in construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

" 'Public records' shall mean any written or printed book or paper . . . of the commonwealth . . . which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth . . . has received or is required to receive for filing . . ."

General Laws c. 66, § 10, provides that

"Every person having custody of any public record shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee . . ."

In II Op. Atty. Gen. 381, the Attorney General ruled that annual statements of insurance companies filed in the office of the Insurance Commissioner, according to the provisions of R. L. c. 118, § 96, were papers which the Insurance Commissioner was by law required to receive for filing and were, therefore, open to inspection as public documents.

In III Op. Atty. Gen. 122, the then Attorney General ruled that annual returns made by companies engaged in the transmission of intelligence by electricity were public records and as such open to the inspection of the public. See also opinion of former Attorney General Paul A. Dever, Attorney General's Report, p. 27, relative to applications for racing licenses.

In the case of *Direct-Mail Service, Inc.* v. *Registrar of Motor Vehicles*, 296 Mass. 353, the court, in a case involving a petition for a writ of mandamus to obtain access to records of the Registrar of Motor Vehicles, said:

"The right to inspect commonly carries with it the right to make copies without which the right to inspect would be practically valueless. . . . We see no reason why the right to make copies is not coextensive with the right to inspect. We believe that in general the public interest will be best served by the largest freedom in the use for lawful purposes of public records kept at the public expense. . . ."

In the light of the foregoing, it is my opinion that the gasoline and alcoholic beverages returns you have referred to are public documents and their contents may be treated as such. Chapter 268A, § 4(*c*), prohibiting the disclosure of confidential information acquired in the course of the official duties of an officer or employee of a State agency, in my opinion, does not limit what I have already said. "Confidential" implies secrecy. It seems quite clear that secrecy does not and should not apply to public records.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Executive Director of a local housing authority which has accepted the Retirement Law, who is a member of the system, and has attained age 70, cannot forego his retirement allowance, and cannot be employed after retirement, except on the temporary basis permitted under the Civil Defense Act.

Nov. 10, 1961.

Mr. Leo F. Benoit, *Chairman, State Housing Board.*

Dear Sir: — By your letter of October 18, 1961, supplemented by that of November 2, 1961, you have requested an opinion relative to the Executive Director of the Chicopee Housing Authority.

In your letter of November 2nd, you state that Alfred J. Plante has been the Executive Director of the Chicopee Housing Authority since May, 1951, and that he attained the age of seventy on October 16, 1961; that he is entitled to receive his contributory retirement allowance but is desirous of foregoing his retirement allowance and remaining as Executive Director. You further state that it is the wish of the Authority to retain Mr. Plante's services, if possible, and you are asked, as Chairman of the State Housing Board, if this can be done.

While you do not so state, I assume that the Chicopee Housing Authority has accepted the provisions of G. L. c. 32, § 28(5), and has brought its employees under the contributory retirement system of the city of Chicopee and that Mr. Plante is a member in good standing of that system.

Section 1 of c. 32 defines, for the purposes of §§ 1 to 28, inclusive, of said chapter, the words "maximum age" as

"the age on the last day of the month in which any member classified in Group 1 as provided for in paragraph (2)(*g*) of section three attains age seventy . . ."

Section 1 also defines the word "employee." It also defines the word "member" as

"any employee included in the State employees' retirement system, in the teachers' retirement system or in any county, city or town contributory retirement system established under the provisions of sections one to twenty-eight inclusive, or under corresponding provisions of earlier laws, and if the context so requires, any member of any contributory retirement system established under the provisions of any special law."

The word "service" is defined as

"service as an employee in any governmental unit for which regular compensation is paid."

"Governmental unit" is defined as

"the commonwealth or any political subdivision thereof . . ."

"Political subdivision" is defined as

"the metropolitan district commission or any county, hospital district, city, town, district or housing authority established under the provisions of section twenty-six L of chapter one hundred and twenty-one, or other public unit in the commonwealth."

General Laws c. 32, § 28(5)(*a*)(*b*), provides for the acceptance of the provisions of §§ 1 to 28, inclusive, by any housing authority established under the provisions of § 26L of c. 121. Read together, the foregoing provisions indicate that Mr. Plante is entitled to the benefits of and subject to the provisions of §§ 1 to 28, inclusive.

Section 3(2)(*e*) provides that

"No member, except as otherwise provided for in subdivision (1) of

section five or in section ninety-one, or in section twenty-six of chapter six hundred and seventy of the acts of nineteen hundred and forty-one, or in chapter sixteen of the acts of nineteen hundred and forty-two as amended, shall remain in service after attaining the maximum age for his group or after the date any retirement allowance becomes effective for him, whichever event first occurs."

Moreover, under the provisions of G. L. c. 32, § 20(5)(*e*), it is provided, referring to the retirement boards, that

". . . It shall be the duty of such board to notify each such member or employee, the head of his department and the treasurer or other disbursing officer responsible for paying his compensation, of the date when such member or employee will attain the maximum age for his group, *and such member or employee shall not be employed in any governmental unit after such date except as otherwise provided for in sections one to twenty-eight, inclusive.* . . ." (Emphasis supplied.)

Accordingly, by virtue of the express provisions of §§ 1 to 28, inclusive, of G. L. c. 32, in my opinion Mr. Plante may not remain as Executive Director.

However, under and subject to the provisions of St. 1950, c. 639, relating to civilian defense, particularly § 9(*h*), with the written approval of the housing authority, Mr. Plante may, having been retired, be temporarily re-employed, his retirement allowance being deducted from his compensation.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Non-citizens to be employed as teachers in the public service, if not exchange teachers, are required to take and subscribe to the oaths required by G. L. c. 264, § 14.

Nov. 14, 1961.

MR. EVERETT V. OLSEN, *Assistant to the President, Lowell Technological Institute, Lowell, Massachusetts.*

DEAR SIR: — In your letter of recent date, relative to the contemplated employment of a non-citizen, part-time instructor who might be considered a teacher, you pose the following two questions:

"1. Can the Institute employ non-citizen teachers who might not find it consistent with their national allegiance to sign or subscribe to either of the aforementioned oaths?

"2. If a non-citizen teacher or employee finds that he cannot subscribe to one or both of these oaths, can he be employed and compensated for his services from State appropriations?"

As you state, G. L. c. 71, § 30A, is restricted to citizens of the United States who become teachers within the Commonwealth. A previous Attorney General has ruled that this provision does not apply to a non-citizen. Attorney General's Report, 1936, p. 31.

However, G. L. c. 264, § 14, provides in part that

"*Every* person entering the employ of the commonwealth or any political

subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation: —. . ."

In this connection it should be noted that § 14A of c. 264 does apply to non-citizens entering the employment of any city or town of the Commonwealth. This section relates to exchange teachers from abroad and the concluding sentence specifically provides that

"The exchange teacher from abroad shall not be required to take or subscribe to any oaths or pledge of allegiance which is inconsistent with his citizenship in a foreign country."

In my opinion, therefore, G. L. c. 264, § 14, does apply to non-citizens entering the employment of the Commonwealth.

Subject to the foregoing, I therefore answer your questions 1 and 2 in the negative.

In addition to the above questions, you have asked two hypothetical questions regarding visiting professors and non-citizens generally. In Attorney General's Report, 1935, p. 31, the then Attorney General Paul A. Dever stated:

"The long-continued practice of this department and the precedents set by my predecessors in office indicate, what is undoubtedly the correct rule of law, that it is not within the province of the Attorney General to determine hypothetical questions which may arise . . . nor is it the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of officials thereunder, except as such interpretations may be necessary to guide them in the performance of some immediate duty."

Accordingly, I feel constrained not to answer those questions at the present time.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

"Code of Ethics" provision as to disclosure of interests in activities regulated by agencies of, or entities doing business with, the Commonwealth, requires statement only of the holding of such an interest, but furnishing further information is desirable.

NOV. 20, 1961.

HON. KEVIN WHITE, *Secretary of the Commonwealth.*

DEAR SIR: — You have requested my opinion as to whether the following statement, filed by a member of the Legislature pursuant to St. 1961, c. 610 (G. L. c. 268A, § 4(*j*)), complies with the requirements of this section. The statement reads as follows:

"Dear Mr. Secretary:

In compliance with Chapter 610 of the Acts of 1961 (Section 4, Paragraph J), I herewith file my name with you, being subject to jurisdiction by state regulatory agencies."

The aforesaid § 4(*j*), inserted by St. 1961, c. 610, reads as follows:

"If any officer or employee of the commonwealth, a member of the

legislature, legislative employee, or his spouse, any of his children, or any spouse of any of his children shall have a financial interest, direct or indirect, having a value of ten thousand dollars or more in any activity which is subject to the jurisdiction of a regulatory agency or in any business entity which does business with the commonwealth, he shall file with the state secretary, within ninety days after the effective date of this act, and thereafter within thirty days after such interest comes into being, a written statement that he has such a financial interest in such activity which statement shall be open to public inspection. If any such officer or employee shall fail to file any such written statement required hereby, he shall be punished after conviction by a fine of not more than one thousand dollars."

It is a well-settled principle of statutory interpretation that the intent of the Legislature must be effectuated. The obvious intent of the Legislature in enacting this Code of Ethics for public servants as stated in § 1 of c. 610 was to assure the public that "no substantial conflict between private interests and official duties exists in those who serve them."

It does not appear to be the intent of the statute to compel disclosure by a public servant of the identity and extent of those private interests which are so remote from the area of his public responsibilities that, in the normal course of events, no possible conflict of interest could arise. For example, § 4(*j*) should not be deemed to require the detailed reporting of items in which the employee and members of his family have no beneficial interest, as in property held as fiduciary, or the listing of such items as life insurance and bank deposits by those officers and employees not engaged in agencies regulating such activities. Similarly, § 4(*j*) should not require the detailed reporting of holdings of usual investment securities, acquired in ordinary course, where the duties of the public servant do not call upon him, acting as representative of the Commonwealth, to conduct business with or regulate the company in which the investment exists.

It is my opinion that the statement which you have submitted to me satisfies the *minimal* requirements of § 4(*j*) of G. L. c. 268A, for I construe it to mean, "I herewith file my name with you since I have a financial interest in an activity subject to the jurisdiction of state regulatory agencies."

However, in the light of the statement of intent and of the standards of conduct for public servants set out in § 4, it is my further opinion that, while not legally required, it is desirable that a public servant supply such information as is necessary to indicate whether or not a conflict of interest exists for that individual by virtue of financial interests reported and his position in government. It is to be noted that the statement submitted does not deny the possibility of the existence of such a conflict.

My answer to your question is, therefore, in the affirmative.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General.*

A special statute providing for retroactive adjustments in compensation for employees of the State Department of Public Works who performed duties of positions of higher grade, is not subject to general limitation provisions.

Nov. 21, 1961.

Hon. Charles Gibbons, *Commissioner of Administration.*

Dear Sir: — You have requested an opinion as to the proper interpretation of the effect of St. 1961, c. 624.

Said chapter reads as follows:

"Notwithstanding the provisions of section twenty-four B of chapter thirty of the General Laws, or any other general or special law to the contrary, employees in the department of public works who have been assigned the duties of a position allocated to a higher class in the general salary schedule for the pay plan of the commonwealth than that to which their payment or temporary positions have been allocated shall be paid the difference in the salary actually received by them and the salary which they would be entitled to receive if they had been properly appointed by their appointing authority to such position allocated to a higher class in said general salary schedule from the date determined by the director of personnel and standardization when such work was performed by them and the effective date of this act or the time when their assignment to such higher class was corrected by approved requisition whichever is the lesser, provided such employment would have been in accordance with the civil service laws and rules. Approved June 2, 1961."

You state that appeals are being made to the Director of Personnel and Standardization under said c. 624 by employees of the Department of Public Works who claim to have been working out of classification as far back as 1956.

You ask the following questions:

"A. Does St. 1961, c. 624, apply solely to the appeals before the Director of Personnel and Standardization initiated and heard by said Director of Personnel and Standardization prior to the actual signing of the act?

"B. Does St. 1961, c. 624, apply to appeals initiated with the Director of Personnel and Standardization after the signing of the act but before its effective date?

"C. Does St. 1961, c. 624, apply to appeals initiated with the Director of Personnel and Standardization at any time after its effective date?

"D. What effect does G. L. c. 30, § 24B, have on questions B and C?

"E. What effect does G. L. c. 260, § 3A, have on questions B and C?"

There is no reference whatsoever in any part of c. 624 to appeals initiated before its effective date and no provision is contained in the act restricting in any way the benefits provided for the employees referred to, who performed work in higher classifications than that for which they were paid prior to the effective date of the act. The answer to your question A, therefore, is "No," and the answer to your questions B and C is, in each instance, "Yes."

It is specifically provided at the beginning of c. 624 that its provisions shall apply "Notwithstanding the provisions of section twenty-four B of chapter thirty of the General Laws, or any other general or special law to the contrary . . ." and, therefore, the answer to your question D is that said § 24B has no effect in the respects referred to.

Chapter 624 is a special provision made by the Legislature for the benefit of certain employees of the Commonwealth itself. The act contains no provisions limiting its application to any particular period prior to its effective date and, therefore, the answer to your question E is that said G. L. c. 260, § 3A, has no effect in the respects referred to.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

A high powered air rifle is a "rifle," within G. L. c. 140, § 122, requiring a license for the sale of firearms, rifles, etc.

NOV. 30, 1961.

HON. FRANK S. GILES, *Commissioner of Public Safety.*

DEAR SIR: — You have recently inquired of me whether a person who engages in the business of selling high powered air rifles is required to be licensed as provided for in G. L. c. 140, § 122, as amended by St. 1957, c. 688.

General Laws, c. 140, § 122, as amended, reads in part:

"The chief of police or the board or officer having control of the police in a city or town . . . may, after an investigation, grant a license to any person except an alien, a minor, or a person who has been convicted of a felony or of the unlawful use, possession or sale of narcotic or harmful drugs, to sell, rent or lease firearms, rifles, shotguns or machine guns, or to be in business as a gunsmith. . . ."

Section 121 of this chapter defines "firearms" as used in §§ 122 to 131F of said chapter ("a pistol, revolver or other weapon . . . from which a shot or bullet can be discharged and of which the length of barrel, . . . is less than eighteen inches"), but does not define "rifles" or "shotguns." Attorney General Clarence A. Barnes rendered an opinion that the definition of "firearms" included an air pistol or air rifle from which a shot or bullet may be discharged, the barrel of which is less than eighteen inches in length. Attorney General's Report, 1948, p. 62. I agree with my predecessor's opinion in this regard, and, by the same reasoning, I would say that air rifles with barrels in excess of eighteen inches in length are within the category of either "rifles" or "shotguns."

Therefore, it is my opinion that the answer to your question is in the affirmative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

Meetings for induction of newly elected city officials may be held on New Year's Day despite provisions that Sunday laws shall be applicable on that day.

DEC. 1, 1961.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth.*

DEAR SIR: — In your recent letter you state that you have been asked "Can the City Council of Taunton legally meet to organize on the first Monday of January next, as their charter stipulates, in view of the fact that that day happens to be January 1, a legal holiday?" Your letter further indicates that this same problem "concerns Pittsfield, Boston, and possibly other cities in the Commonwealth."

The basis for your query obviously relates to G. L. c. 136, § 33, inserted by St. 1960, c. 812, § 3, as amended by St. 1961, c. 338, which provides that:

"The provisions of this chapter shall apply from midnight to midnight on each of the following holidays, except as provided in section thirty-seven, and the public offices shall be closed on all of said days: January first, May thirtieth, July fourth, First Monday of September, October twelfth, November eleventh, Thanksgiving Day, and Christmas Day."

In so far as the provisions of c. 136 may now be applied to legal holidays, the question is basically whether any provision of c. 136, extended to January first, proscribes the activity described in your query.

The foundation stones of c. 136 are §§ 2, 3 and 5, which in a general way prohibit all work and play on Sundays and now on legal holidays, with exceptions not here material. Other prohibitions are found throughout c. 136 but they are not germane to your query.

Chapter 136, as you know, was sustained by the Supreme Court of the United States in the case of *Gallagher* v. *Crown Kosher Super Market of Massachusetts, Inc.*, U. S. (May 29, 1961) 29 U.S.L. Week 4505. While I am unaware of any decision of our Supreme Court on the subject matter, it is my opinion that a careful reading of the sections of c. 136 enumerated above, fails to disclose any purpose to interrupt or paralyze the organization of the municipal governments of the State.

In this connection, I direct your attention to G. L. c. 43, § 17 which directs that "On the first Monday in January following a regular municipal election, at ten o'clock in the forenoon, the mayor-elect if elected by the people, the councillors-elect, and the assessors-elect if elected by the people, *shall* meet and be sworn to the faithful discharge of their duties." And again in § 15: "In each city adopting any plan provided for by this chapter, the municipal year *shall* begin and end at ten o'clock in the morning of the first Monday of January in each year." Similarly in § 11: ". . . and their terms of office *shall* begin at ten o'clock in the forenoon of the first Monday of January following their election." (Emphasis supplied.)

With so many cities deriving their form of government from c. 43, I should hesitate to attribute to our Legislature an intent to be inferred in c. 136 contrary to any of the provisions contained in c. 43 without express language to that effect. A continued orderly, effective, legal organization of city government without interruption even for a short time is, in my opinion, imperative.

A word of caution seems appropriate at this point. It is obvious that among the cities of our Commonwealth, there are differences in the provisions of their respective charters and ordinances which conceivably may call for activities that might be regarded as more than ministerial or which,

if permitted to suffer delay, would not disrupt the orderly organization of government. It would be virtually impossible to anticipate all such activities. Accordingly, it must be understood that I have expressed my views only on the general question which you have raised in an attempt to cooperate with your request. They are not an expression of opinion on any specific factual situation which may arise in a particular city.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The funds available to the Board of Library Commissioners for extension of library services may not be used for direct payments of additional compensation to a local library official for his administrative direction of a regional library; only aid to municipalities and libraries is permissible.

DEC. 6, 1961.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — In your letter of recent date relative to G. L. c. 78, §§ 19C and 19D, you state that the program budget for the Western Regional Public Library System Plan, with headquarters at City Library in Springfield and under the administrative direction of the Springfield Library and Museums Association Director, provides for a payment from State regional public library service funds up to one-fifth of the salary of the Springfield Library Director as a reimbursement for his administrative direction of the regional library system. You further state that the Springfield Library Director is currently serving as an unpaid member of the Board of Library Commissioners and that it is understood that the above payment would be over and above his regular salary as Springfield Library Director for work performed outside of and beyond his regular tour of duty. You now request whether under the circumstances such a reimbursement payment from State funds can legally be made. In my opinion it may not.

General Laws c. 78, § 19, provides that the Board of Library Commissioners may expend such sums as may be appropriated for the extension and encouragement of library services within the Commonwealth. The board is designated as the State agency to deal with the Federal Government with respect to Federal grants which may be made available to the Commonwealth for promoting library services and to administer such State plans as may be approved as a condition of such grants. "The board may contract *with any other state agency, city or town, public or private library* to provide improved library services in an area, or to secure such library services as may be agreed upon. . . ." (Emphasis supplied.)

Section 19C of c. 78, inserted by St. 1960, c. 760, provides, among other things, (1):—

"In so far as practicable the board shall enter into an arrangement or arrangements *with such public library or libraries in each regional area* as it may determine under the terms of which such *library or libraries shall supply services* or space, equipment, *personnel*, books, periodicals and other library materials. . . ." (Emphasis supplied.)

Subdivision (2) provides that:—

"Said board shall also designate such public library or libraries in each

area or an additional such public library or libraries in the area to serve as a regional reference and research center or centers to meet the reference and research library needs of the residents of all the cities and towns in the area; the amount allocated for such reference and research service to be applied only to the *cost* of such reference . . . and to the *cost* of the personnel employed in such reference and research service; . . . (Emphasis supplied.)

It should be borne in mind that c. 760 is entitled, "AN ACT PROVIDING STATE AID FOR FREE PUBLIC LIBRARIES."

While the matter may not be fully free from doubt, the statutory pattern of the legislation already referred to indicates, in my opinion, an attempt on the part of the General Court to "aid" the political entities and public and private libraries referred to therein. It does not envision the Board of Library Commissioners supplementing local salaries with salaries paid by the commissioners. The legislation contemplates "aid" by the Board of Library Commissioners to the municipalities and public and private libraries referred to. I am constrained, therefore, in the light of the foregoing, to say that, in my opinion, the proposed supplemental payment by the commissioners to the salary of the Springfield Library Director directly would not be proper.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A prisoner arraigned on separate dates in separate counties and later sentenced in each county is entitled under G. L. c. 127, § 129B, to credit against each sentence for the period he spent in jail awaiting trial from the time of arraignment until the date of the first sentence.

DEC. 6, 1961.

HON. GEORGE F. McGRATH, *Commissioner of Correction.*

DEAR SIR: — In a letter requesting an opinion as to a certain person, you state the facts are as follows:

September 29, 1956, the person referred to was ordered by the Chelsea Court to be confined at Charles Street Jail awaiting trial for offenses in Suffolk County.

November 13, 1956, he was indicted in Middlesex County (while in Charles Street Jail) and habeas corpus issued to answer.

November 16, 1956, he was removed from Charles Street Jail on habeas corpus and arraigned in Middlesex Superior Court on the same day; pleaded not guilty; ordered to recognize $20,000 bail and remanded back to Charles Street Jail and was so removed the same day.

February 10, 1957, he was taken by legal process from Charles Street Jail to Middlesex County Jail to await trial for four days.

February 14, 1957, he was sentenced as follows: 9–10 years, armed robbery; 9–10 years, *from and after*, for armed robbery.

February 20, 1957, he was again taken by legal process from State Prison to Suffolk Superior Court where he received sentence of 15–18

years, *concurrent* with previous sentence in Middlesex County and 3–4 years, *concurrent* for robbery armed.

Suffolk County sentence has been reduced by 133 days for the period of September 29, 1956, to February 10, 1957, while he was awaiting trial at Charles Street Jail by crediting the Suffolk County sentence as having been deemed to have been served 133 days prior to February 20, 1957, the date he received his Suffolk County sentence. He received four days' credit for the period from February 10, 1957, to February 14, 1957, on his Middlesex County sentence.

Question: Under the above facts, has the person referred to been properly credited the number of days spent in confinement awaiting trial on each sentence under G. L. c. 127, § 129B?

General Laws c. 127, § 129B, as most recently amended by St. 1961, c. 74, reads as follows:

"The sentence of any prisoner in any correctional institution of the commonwealth or in any house of correction or jail, who was held in custody awaiting trial shall be reduced by the number of days spent by him in confinement prior to such sentence and while awaiting trial, unless the court in imposing such sentence had already deducted therefrom the time during which such prisoner had been confined while awaiting trial."

The quoted statute has been interpreted in *Stearns, petitioner*. 343 Mass. 53. In that case one Stearns was arrested on January 9, 1946. He was confined to the Middlesex County House of Correction from January 10, to February 8, 1946. From February 8 to March 18, 1946, he was at the Metropolitan State Hospital for observation. Thereafter, he was committed as insane and confined at Bridgewater State Hospital. From February 8, 1950, to April 20, 1950, he was again in jail, East Cambridge, "awaiting trial." On April 20, 1950, he was sentenced to 15–20 years on two counts of assault with intent to murder, being armed, and 8–10 years on assault and battery with a dangerous weapon, all sentences to run concurrently. The court held that Stearns was entitled to time spent in the hospital as an insane prisoner under criminal process. The court stated at page 1097:

"There can be no doubt that § 129B applies to the time spent in jail between the day of arrest and the day the indictment was reached for trial."

The question asked is whether the proper number of days was credited under the provisions of G. L. c. 127, § 129B.

Broadly speaking, a convict should be credited with all time spent in jail after arrest in connection with the offense by which he has been sentenced, although he may be denied credit where he is not considered "awaiting trial" or he is in a place of confinement not regarded as a prison or jail. *Price* v. *McQuinness*, 269 F. 977; *People ex rel. Le Carta* v. *Warden*, 193 N. Y. 561; *Murphy* v. *Holcomb*, 181 N. Y. S. 780.

Under statute, a convict may be entitled to credit for time spent in jail "awaiting trial," although in the absence of statutory regulation the matter rests to some extent in the court's discretion and credit may or may not be allowed for such time, or for time spent awaiting sentence after conviction. *Gabriel* v. *Warden*, 178 N. Y. 595; *Ex parte Doirs* (Texas), 160 S. W. 459; *Maloney* v. *Warden*, 229 N. Y. S. 536; *People* v. *State Prison*, 66 N. Y. 342.

A Massachusetts statute that was controlling on this point was § 33A of G. L. c. 279, which read as follows:

"The court on imposing a sentence of commitment to a correctional

institution of the commonwealth *may, in its discretion,* order that the prisoner be deemed to have served a portion of said sentence, such portion to be determined by the court and not to exceed the number of days spent by the prisoner in confinement prior to such sentence awaiting and during trial." (Emphasis supplied.)

It is a court custom in this Commonwealth to credit a prisoner with the number of days spent in jail in each specific sentence accorded by different counties. However, there is nothing in the wording of § 33A that leads me to believe that the court cannot do otherwise if it so pleases. In point of fact the statute reads specifically ". . . may, in its discretion. . . ."

There no longer appears the discretionary feature of § 33A but rather the General Court stated most emphatically ". . . shall be reduced . . ." in the above section.

The only other case on this issue as to what is meant by "awaiting trial" was decided in 1910 wherein a North Dakota statute provided that terms of the county court held in the months of February, June, and December shall be Jury Terms, provided there be a criminal case "awaiting trial." The court in interpreting the statute to its own set of facts concluded that: "We do not think that a case is awaiting trial when the accused has only been bound over and is not confined in jail, but at large under a bond for his appearance." *State* v. *Fleming*, 20 N. D. 105, 107.

As to the Middlesex sentence, in accordance with the decision in the *Stearns* case, *supra*, the person referred to should be credited with all time spent in custody from the date of his arraignment in Middlesex County, *i.e.*, November 16, 1956, up to February 14, 1957, the date on which he was sentenced in the Middlesex Superior Court, regardless of whether this time spent in custody was in the Suffolk or Middlesex County jails. Likewise, the Suffolk County sentence is to be reduced by the time attributable to the period from September 29, 1956, to February 14, 1957.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Joseph T. Doyle,
Assistant Attorney General.

The Commissioner of Mental Health is authorized under G. L. c. 123, § 7, to establish regulations, with penalties, as to parking and speed of motor vehicles on the grounds of State hospitals; form of proposed regulations, application of Administrative Procedure Act and police officers to enforce, discussed.

Dec. 8, 1961.

Harry C. Solomon, M. D., *Commissioner of Mental Health.*

Dear Sir: — In your letter of recent date relative to controlling motor vehicle traffic on the grounds of hospitals within the jurisdiction of your department you ask the following questions:

"1. Am I legally authorized to establish regulations of a punitive nature, which affect the general public on the grounds of institutions under the jurisdiction of this department, within the provisions of G. L. c. 123, § 7, as amended?

"2. If the answer to (1) above is in the affirmative, are the two proposed regulations adequate and proper for legally authorized police officers or special State police officers appointed in accordance with G. L. c. 147, § 10B, as amended, to make requests to the respective courts for the issuance of summonses for alleged violations thereof?"

The proposed regulations referred to in your second question are as follows:

"1. Parking of motor vehicles on the grounds of the State hospitals is prohibited in posted areas. Parking within 12 feet of a fire hydrant is prohibited. Parking within 12 feet of an entrance to a hospital building is prohibited.

"2. Speeds in excess of 20 miles an hour are prohibited on the grounds of the mental hospital. When patients are crossing the road, motor vehicles will come to a complete stop, proceeding when the patients have crossed the road. The penalty for above violations will be $5.00 for the first offense and $10.00 for the second offense and every offense thereafter."

General Laws c. 19, § 1, provides in part as follows:

"There shall be a department of mental health, in this chapter called the department, and a commissioner of mental health who shall have the exclusive supervision and control of the department. . . ."

General Laws c. 123, § 4, provides that the commissioner shall administer the laws relative to persons in institutions under his general supervision. Section 7 of c. 123 provides that

"The department shall provide for the efficient, economical and humane management of the State hospitals. It shall establish by-laws and regulations, with suitable penalties, for the government of said State hospitals. . . ."

Section 8A of said chapter provides:

"Upon request of the department, the department of public works may construct and maintain roads on the grounds or property of a State hospital; and expenses so incurred shall be paid from appropriations for the maintenance of such hospital."

The wording of sections 1, 4, 7 and 8A, hereinbefore referred to, provide you, as head of the Department of Mental Health, in my opinion, with the authority to establish reasonable regulations relative to parking and traffic of motor vehicles on the grounds of the various State hospitals under your jurisdiction and to establish suitable penalties for the violation thereof. The answer to your first question, therefore, in my opinion, is in the affirmative.

The proposed regulations, in my opinion, are within the scope of your authority. While it is not the function of this office to draft and pass upon regulations of this kind in advance of actual rights involved thereunder, I suggest that your regulations deal with the different offenses in different sections. The penalty provisions should be contained in a separate section. The regulations are, of course, made by the department acting through you as its commissioner.

The State Administrative Procedure Act (G. L. c. 30A, § 1(5)), defining the word "regulation," specifically excludes from the definition "regulations concerning the operation and management of state penal, correctional, welfare, educational, public health and mental health institutions . . ." However, it is proper that you should see that copies of your regulations are permanently posted at all points needful to inform those to whom they

apply, of their existence. Moreover, I suggest that permanent evidence be kept in your files of the posting. If your rules are carefully drafted, as I know they will be, and carefully posted, you should have no trouble.

In response to your second question, it is my opinion that the special police officers referred to in G. L. c. 147, § 10B, appointed in accordance with its provisions, and acting within the scope of their authority, should be adequate to enable you to secure summonses from the different courts for violations thereof.

There may be some doubt as to whether G. L. c. 30, § 37, applies to rules and regulations such as the ones you propose. However, out of an abundance of caution, I would say that an attested copy of them, together with a citation of the law by authority of which the same purport to have been issued, is placed on file with the Secretary of State as therein provided.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The provisions of G. L. c. 110A, §§ 11B and 11C, applicable to "Periodic payment plan certificates" are not applicable to "Face amount plan certificates," sold on the installment plan, by Investors Syndicate of America.

DEC. 8, 1961.

HON. ROY C. PAPALIA, *Chairman, Department of Public Utilities.*

DEAR SIR: — You have recently inquired of me whether Face Amount Plan Certificates of Investors Syndicate of America, Inc. offered for sale on an instalment basis by Investors Diversified Services, Inc. come within the purview of G. L. c. 110A, §§ 11B and 11C.

At your suggestion I conferred with the supervisor of your Securities Division, who was most helpful in my examination of this question and who supplied me with the forms of certificates in question together with a 1960 annual report and a 1961 prospectus of the issuing company.

The sections of G. L. c. 110A, in question are part of an amendment by St. 1950, c. 822 which added the italicized words to § 11 of said chapter:

"No person . . . shall sell any security, *including periodic payment plan certificates and face amount plan certificates,* . . . which is to be paid for upon an instalment or partial payment plan, unless such plan has first been approved by the commission." (Emphasis supplied.)

Sections 11A, subsection (*a*), 11B and 11C read as follows:

"*Section 11A.* The following terms shall, in sections eleven A to eleven E, inclusive, have the following meanings, unless the context otherwise requires:—

"(*a*) 'Periodic payment plan certificate' means (A) any certificate, investment contract, indenture of trust, or other security providing for a series of periodic payments by the holder or founder, and representing an undivided interest in certain specified securities or in a unit or fund of securities purchased or to be purchased wholly or partly with the proceeds of such payments; and (B) any security the issuer or sponsor of which is

also issuing securities of the character described in clause (A), and the holder or founder of which has substantially the same rights and privileges as those which holders or founders of securities of the character described in clause (A) have upon completing the periodic payments for which such securities provide.

"*Section 11B.* Each periodic payment plan certificate shall contain or have attached thereto (1) a schedule showing the total deductions including sales load and all other charges which are to be paid or taken from the first instalment payment made by the holder or founder, and also the sales load and deductions which are to be taken from all succeeding payments; (2) a complete description of the terms, conditions, privileges, duties and responsibilities of the holder or founder, and of the sponsor, issuer, custodian and trustee.

"*Section 11C.* If after making his initial payment, whether for one or more instalments, and prior to making a succeeding payment, the holder or founder shall for any reason whatsoever elect to surrender his periodic payment plan certificate for cancellation, he shall be refunded the full amount paid in by him; provided, that written request for cancellation is made within thirty days after mailing of the registered letter and statement required by section eleven B by the issuer, sponsor, custodian, or trustee, and before a second succeeding payment has been made by the holder or founder. If no such written request for cancellation is made within thirty days as aforesaid, it shall be presumed that the holder or founder fully understood at the time of the issuance of the periodic payment plan certificate all of its terms and provisions and has agreed to be fully bound thereby."

The question you have presented is simply whether or not issuers of "face amount plan certificates" are required to comply with the specific provisions in §§ 11B and 11C which refer to "periodic payment plan certificates." In the statute there is no definition of "face amount plan certificate" and thus I considered the possibility that the definition of "periodic payment plan certificate" contained in § 11A comprehended "face amount plan certificates." Consistent with the recognized canons of statutory interpretation, I examined the Report of the Special Commission established to Investigate and Study the Sale and Distribution Within the Commonwealth of Certain Securities and Investment Contracts Upon Installment or Periodic-Payment Plans, July, 1949. The recommendations contained in the Majority Report were enacted intact as St. 1950, c. 822. On page 7 of the Report is found the following description of "face-amount-certificate-plan":

"Of the four companies which appeared before the Commission, only Investors Syndicate of America, Inc., has been qualified to do business in practically all the 48 States as well as Canada. Investors Syndicate of America, Inc., has an entirely different plan from the other companies under study. It is designated as the face-amount-certificate plan, in which the certificates are the direct obligations of the issuer in a definite amount of each plan. The issuer is committed to repay a definite amount under stated conditions of payment and length of time, and to maintain minimum certificate reserves. The certificate holder knows in advance the surrender value of his shares at various times, and the value is not affected by changes in the market value of the investment fund."

Immediately following the above, on pages 7 and 8, the Report went on:

"The other types of plans offer what is called a unit-investment-trust

plan under which each periodic-payment, less certain expenses or load, produces a balance which is available for the purchase of an undivided interest in the investment fund. As income is received on the investments, and is available for distribution, it is either (1) paid to the holder or founder (with deductions for certain fees), or (2) reinvested for the holder or founder through the purchase of an additional undivided interest in the fund. The number of shares (of undivided interest) which may be purchased through the investment balance of a periodic payment or through the distribution of income depends on the market value of the fund at the time of such purchase or distribution. When a holder or founder wishes to terminate his plan, he has a certain total number of shares of interest in the plan, but the amount he will receive therefor depends on the market value of the funds at the time of termination. The value of a holder's or founder's interest in the fund, therefore, is affected by changes in the market value of investments in the fund."

It is apparent from the above excerpts that not only are there very material differences between "face amount plan certificates" and "periodic payment plan certificates" but that the drafters of the legislation in question *were quite conscious of the differences.* Indeed, it should be noted that the "face-amount-certificate plan," referred to by the Special Commission, is the same plan of Investors Syndicate of America, Inc. with which you are presently concerned. I find it significant that "face amount plan certificates" were specifically included with "periodic payment plan certificates" in § 11 and yet were omitted from the following sections. Under the usual rules of statutory construction where a matter is specifically referred to, there is an inference that all omissions were intended. This principle of *"expressio unius est exclusio alterius"* was applied to a similar problem in *Iannelle* v. *Fire Comm'r of Boston*, 331 Mass. 250 (1954).

There is no evidence in the statutes nor in the documentary legislative history that the Legislature intended to include "face amount plan certificates" in the definition of "periodic payment plan certificates" set forth in § 11A nor does that definition in fact describe "face amount plan certificates." The principles of statutory construction do not permit me to consider the "intent" of legislators or others concerned in the drafting of the legislation here under examination where that intent cannot be found in the documented legislative history. Sutherland, Statutory Construction, (1943) c. 50.

In conclusion, I must say that it is my opinion that G. L. c. 110A, §§ 11B and 11C, do not apply to the face amount plan certificates issued by Investors Syndicate of America, Inc. even though they are sold on an instalment basis.

Since the securities involved are in fact being sold in the Commonwealth, I assume that the instalment payment plan used has been approved by the commission as provided for in § 11.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

Earlier loan appropriations for recreational construction by the Metropolitan District Commission could be expended for work at the Franklin Park, and Middlesex Fells, Zoos, despite a later appropriation for a special recreational construction program by the Commission including a specific amount for the zoos.

DEC. 11, 1961.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have requested an opinion on the following question:

"Does the appropriation Item No. 9027–03 (St. 1961, c. 517) preclude the further use of funds from the 1957 and 1959 Recreational Loans (St. 1957, c. 627; St. 1959, c. 549) for construction and improvements at the Franklin Park Zoo and the Middlesex Fells Zoo?"

You state the following as to the matter referred to in your question:

"Under the provisions of St. 1957, c. 627, and St. 1959, c. 549, the Metropolitan District Commission was authorized to construct recreational facilities and to enlarge and improve existing facilities.

"Among the projects planned was one for a service center at the Franklin Park Zoo. An architect was retained in 1960 and plans have since been prepared. Sealed bids for the construction award are due to be opened on Tuesday, December 5, 1961.

"In the meantime, the Legislature enacted St. 1961, c. 517, which contained the following item:

" '9027–03 For the construction, reconstruction, alteration and improvement of the facilities at the Franklin park zoo in the Dorchester district of Boston and the Middlesex Fells zoo in Stoneham, including the cost of furnishings and equipment; and for the construction, enlargement and improvement of parking facilities in connection therewith $750,000.' "

You stated that the Comptroller has informed you that you

". . . may not charge the 1957 or the 1959 recreational loans with the contract for the service center at Franklin Park or with any contract for either the two zoos mentioned in Item 9027–03. He bases his objection on G. L. c. 29, § 15, which states that an appropriation shall supersede an earlier one made for the same object."

Acts of 1957, c. 627, authorized and *directed* the Metropolitan District Commission "to construct, enlarge and improve its recreational facilities within the metropolitan parks district . . . at such locations as it may determine," and provided that to meet the expenditures necessary in carrying out the construction and improvements authorized, the State Treasurer should issue serial payment bonds not exceeding $5,000,000 in the aggregate, to be paid by district assessments, assessed by methods fixed by law.

Acts of 1959, c. 549, authorized and *directed* the Metropolitan District Commission "to construct recreational facilities within the metropolitan parks district, and to enlarge and improve existing facilities, in such manner and at such locations as it may determine," and provided that to meet the expenditures necessary in carrying out the construction and improvements authorized, the State Treasurer should issue serial payment bonds, not exceeding $5,000,000 in the aggregate, to be paid by district assessments, assessed by methods provided by law.

Acts of 1961, c. 517, in § 1 states that "to provide for a *special* program of construction, reconstruction, alteration and improvement of the various

recreation and other facilities within the metropolitan parks district, the sums set forth in section two . . . are hereby made available subject to the approval of the metropolitan district commission. . . ." (Emphasis supplied.) Section 2 of the act contains three items, the first, 9027–01 of $3,900,000; the second, 9027–02 of $350,000; and the third, 9027–03 of $750,000, for a total of $5,000,000. Section 3 provides that to meet the expenditures necessary in carrying out the provisions of § 2, the State Treasurer shall issue serial payment bonds, not exceeding $5,000,000 in the aggregate, to be paid by district assessments, assessed by methods fixed by law.

General Laws c. 29, § 15, reads as follows:

"An appropriation shall supersede an earlier one made for *the same object.*" (Emphasis supplied.)

In order for G. L. c. 29, § 15, to be applicable it must appear that two appropriations have been made for "the same object." If so, the superseding effect given to the later appropriation would effect a reverter to the State treasury of the earlier appropriation, or balance thereof, which was available for the same object specified in the later appropriation.

Acts of 1961, c. 517, expressly states that the sums set forth in § 2 are made available for the several purposes stated, to provide a *special* program of construction, etc., of the various recreation and other facilities within the metropolitan parks district. The reference to a *special* program in the 1961 act is indicative of a legislative intent that the 1961 authorizations are to be additions to the prior authorizations and are not to have any effect on such prior authorizations.

Item 9027–03 of the 1961 act is a separate authorization for the expenditure of $750,000 on the Franklin Park and Middlesex Fells Zoos in addition to whatever amounts might be expended by the commission on said zoos from the amounts authorized by the 1957 and 1959 acts and does not have the effect of changing the purposes for which the unexpended balances of the funds authorized by those acts may be expended, by prohibiting the expenditure of any of such balances for work at the two zoos referred to.

I advise you, therefore, in answer to your specific question that in my opinion Item 9027–03 is to be construed to authorize expenditures to the amount stated therein, for the purposes stated therein, in addition to any expenditures for said purposes that might have been, or shall be, made under the broader authorizations made in the 1957 and 1959 acts, and that the use of any available funds provided by those acts for construction and improvements at the Franklin Park Zoo and Middlesex Fells Zoo is not precluded by said Item 9027–03.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The Board of Certified Public Accountants has authority to initiate proceedings for suspension or revocation of registration; only residents may be registered.

Dec. 12, 1961.

Mr. Edward Waldstein, *Chairman, Board of Certified Public Accountants.*

Dear Sir: — Your letter of recent date inquires as to "the extent of the powers of your board in regard to complaints against certified public accountants."

Your particular inquiry is what course of action you may pursue where you know of flagrant misconduct by a certified public accountant but have not received a formal complaint.

Citing apparently a specific case you state that:

"A Massachusetts certified public accountant has been found guilty by the Federal courts of another State of preparing false tax returns for clients. If no formal complaint is brought against this man by someone other than a board member, where do we stand?"

If your board has credible evidence of violations of the laws of this Commonwealth, it may properly present the same to the police authorities, the appropriate district attorney, or to this office for appropriate action.

Furthermore, I believe that if your board acts under the authority and within the limits of G. L. c. 112, § 61, and in accordance with all the applicable provisions of the Administrative Procedure Act (G. L. c. 30A) relative to adjudicatory proceedings, your board can, on its own initiative, suspend or revoke a certificate issued by it. I might also add that, in my opinion, it would be advisable for your board to adopt regulations governing suspension and revocation proceedings, if this has not already been done. (See c. 112, §§ 61 and 87A, and c. 30A, § 9.)

Your remaining question reads as follows:

"May we grant a certificate under these sections to a non-resident of Massachusetts who fulfills all the requirements of the Board?"

General Laws c. 112, § 87A, provides, among other things, that "The board of registration of certified public accountants . . . shall examine applicants for registration as certified public accountants. . . ." Section 87B, dealing with the qualifications of the applicants, provides that:

"*The board shall examine any citizen* of the United States resident in the commonwealth and not less than twenty-one years of age, who may apply for a certificate. . . ." (Emphasis supplied.)

Section 87C provides that:

"Any applicant whom the board deems to have the necessary qualifications and professional ability shall be registered as a public accountant by the board and shall receive a certificate thereof signed by the chairman and secretary of the board."

You will note from the foregoing that one of the qualifications for examination is that the applicant must be a "citizen of the United States resident in the commonwealth."

In my opinion, therefore, your board may not grant a certificate to a non-resident of Massachusetts.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

The State Treasurer may invest Highway Fund or General Fund money in notes of the Commonwealth issued to provide funds for loans to cities and towns on tax titles under St. 1933, c. 49; the notes of the Commonwealth to be payable within the maturities fixed in St. 1957, c. 309, which was enacted by the two-thirds vote required by the Constitution.

DEC. 12, 1961.

HON. JOHN T. DRISCOLL, *State Treasurer.*

DEAR SIR: — You have requested an opinion on the following questions relating to a request made to you by the city of Chelsea under St. 1933, c. 49, § 1, as most recently amended by St. 1961, c. 205, § 1, for the borrowing of $70,000:

"1. Can I loan Chelsea $70,000, as approved by the Emergency Finance Board?

"2. Whether or not I, as State Treasurer, must sell said notes to banks or other such purchasers.

"3. Whether or not I, as State Treasurer, may borrow from the Highway Fund or General Fund of the Commonwealth, such borrowing to be approved under G. L. c. 29, § 38(*b*), by the Governor and Council.

"4. For what period of time may I, as State Treasurer, issue a note of the Commonwealth, if your answer to either item one or two is in the affirmative?"

You inform me that the city's request was approved by the Emergency Finance Board at its meeting on December 5, 1961, and point out that said St. 1961, c. 205, was not enacted by a two-thirds vote as required by § 3, of Art. LXII of the Amendments to the Constitution of the Commonwealth, and that St. 1961, c. 591, did not include a section fixing the terms of any notes which might be issued under said c. 205.

Acts of 1961, c. 205, § 1, amends St. 1933, c. 49, § 2, authorizing cities and towns to make tax-title borrowings from the Commonwealth on notes approved by the Emergency Finance Board to permit such borrowing until *July 1, 1963.* Section 2 of said c. 205, amends St. 1933, c. 49, § 5, authorizing the State Treasurer to borrow on the credit of the Commonwealth, with the approval of the Governor and Council, such sums as may be necessary to provide funds for loans to municipalities under the act and to issue notes therefor up to a total of $10,000,000, for such term of years as the Governor may recommend to the General Court, to provide that such notes may be payable not later than June 30, 1966. However, as you state, the 1961 act was not enacted by the two-thirds vote required under Art. LXII of the Amendments to the Constitution.

As most recently amended, prior to the enactment of said c. 205, said St. 1933, c. 49, § 5, had been amended by St. 1959, c. 387, § 2, and next prior to that amendment, by St. 1957, c. 209, § 2.

Said St. 1959, c. 387, like St. 1961, c. 205, was not enacted by the two-thirds vote required by said Art. LXII. However, St. 1957, c. 209, *was* so enacted and the terms of notes or renewals thereof authorized thereby to be issued by the State Treasurer payable not later than June 30, 1962, were fixed by St. 1957, c. 770, § 1. The date of final maturity so fixed was said June 30, 1962.

In an opinion to you under date of June 23, 1961, it is pointed out that the two-thirds vote required by § 3 of Art. LXII of the Amendments to

the Constitution would be necessary only on such amendments to St. 1933, c. 49, as related to borrowings by the Commonwealth under § 5 of that act, and that amendments to § 1 of the 1933 act extending the time for borrowings by cities and towns would be effective despite the lack of a two-thirds vote. It was also ruled in the opinion referred to that since the amendment to St. 1933, c. 49, § 5, by the 1957 act was enacted by a two-thirds vote, and that amendment, and St. 1957, c. 770, authorize the issuance of notes for borrowings by the State Treasurer to provide the funds for loans to municipalities with final maturities of June 30, 1962, such notes might be issued under St. 1957, c. 770, § 1, the final maturities to be not later than June 30, 1962, although it was stated that the question was a difficult one and there are strong reasons for a contrary conclusion. It also appears from that opinion that the limitation of borrowings permitted by St. 1933, c. 49, § 5, as amended, would not be exceeded by the loan now in question.

In accord with the opinion cited, I advise you in answer to your first and fourth questions that you may make loans under the provisions of St. 1933, c. 49, § 5, as amended by St. 1957, c. 209, § 2, and under said St. 1957, c. 770, § 1, to cities and towns, but that the notes you issue for the borrowings to provide funds for such loans must mature not later than June 30, 1962, and, therefore, the notes given to you by the cities and towns should be payable on or before said date.

In answer to your second and third questions I advise you that under G. L. c. 29, § 38(*b*), you may invest moneys in the Highway Fund or the General Fund, with the approval of the Governor and Council, in notes of the Commonwealth issued for borrowings by you to provide funds for loans under St. 1933, c. 49, § 1, which course, or a similar course, we understand has been followed in the past, or borrow from banks or other purchasers, and you are not restricted to borrowing from the latter.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

School committees should be elected in the towns comprising a regional school district. In the absence of local school committees the regional committees may handle the matters of tuition and transportation.

DEC. 26, 1961.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — You have requested an opinion concerning the Southern Berkshire Regional School District and problems of reimbursement in cases where no school committees have been elected by various towns.

You state that the Southern Berkshire Regional School District is composed of five different towns and comprises all the schools from kindergarten through grade twelve. You further state that there are now no elected school committees for such towns and after referring to G. L. c. 41, § 1, you pose the following question:

"(1) Does a Regional School District formed under G. L. c. 71 relieve the individual towns from the necessity of electing a local school committee, and does the regional school committee replace the local school committee?"

You further state that you are informed by Superintendent George H. Daniel of the Southern Regional School District that there are a few boys attending vocational schools outside the towns of the region because there are no vocational school facilities in the towns of the region. After referring to G. L. c. 74, § 8A, you pose the following question:

"(2) How, in the absence of a local school committee, should the matter of tuition and transportation be handled?"

General Laws c. 41, § 1, provides that:

"Every town at its annual meeting shall in every year when the term of office of any incumbent expires, *and except when other provision is made by law*, choose by ballot from its registered voters the following town officers for the following terms of office:

. . . Three, five, six, seven or nine members of the school committee for terms of three years. . . ." (Emphasis supplied.)

General Laws c. 74, § 7, provides that residents of towns in the Commonwealth not maintaining approved independent distributive occupations, industrial, agricultural, household arts and practical nurse training schools offering the type of education desired may, upon the approval of the commissioner under the direction of the state board, be admitted to a school in another town. Section 8 of c. 74 provides that the town where a person resides who is admitted to the school of another town under § 7 shall pay a tuition fee to be fixed by the commissioner, and in default of payment shall be liable therefor to the contract of such other town. Section 8A of c. 74 provides that a town where a person resides who is admitted to a day school in another town under § 7 shall, *through its school committee*, when necessary, provide for the transportation of such person, and shall, subject to appropriation, be entitled to State reimbursement to the extent of fifty per cent of the amount so expended; provided, that no transportation shall be provided for, or reimbursement made on account of, any pupil who resides less than one and one-half miles from the school which he attends.

General Laws c. 71, § 14B, concerning a regional school district provides:

"(*e*) The method by which school transportation shall be provided, and if such transportation is to be furnished by the district, the manner in which the expenses shall be borne by the several towns."

As you are aware, G. L. c. 71, § 16, dealing with the powers of the regional school district, provides that it shall have "all the powers and duties conferred by law upon school committees. . . ." Moreover, § 16C provides that:

"The regional school district shall be subject to all laws pertaining to school transportation; and when the agreement provides for the furnishing of transportation by the regional school district, the commonwealth shall reimburse such district to the full extent of the amounts expended for such transportation, except that no such reimbursement shall be made for transportation of any pupil who resides less than one and one-half miles, measured by a commonly traveled route, from the district school which he attends. . . ."

I notice in connection with § 1 of c. 41 relating to the election of school committees that annual elections are provided for "except when other provision is made by law." It is also to be noted that by virtue of the express

provisions of c. 71, § 16, it is provided that "A regional school district established under the provisions of the preceding section shall be a body politic and corporate *with all the powers and duties conferred by law upon school committees. . . .*" (Emphasis supplied.) The purpose apparently of regional school districts is to provide for co-operative action by the smaller towns of the State where individual schools might place an undue burden on each alone.

It is my opinion that unless and until school committees are elected as provided for in G. L. c. 41, § 1, the regional district school committee, by virtue of the express powers conferred by the provisions of G. L. c. 71, § 16, should act in the place of the town school committee. It would appear wise for each town to have its own school committee. However, where the towns have united in a regional school district, the district committee appears to act in the place of the local schools.

Answering, therefore, your second question, the matter of tuition and transportation may, in the absence of a local school committee, be handled by the regional district school committee.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

There is nothing in the applicable statutes which requires a conclusion that local licenses may not be issued restricted to sale of milk, or of cream, but can only be issued for the sale of both milk and cream.

DEC. 26, 1961.

ALFRED L. FRECHETTE, M.D., *Commissioner of Public Health.*

DEAR SIR: — You have requested an opinion regarding G. L. c. 94, relating to the licensing of milk dealers by local inspectors. In your letter you stated:

"The inspector for the city of Newton has refused to issue a license to a company to sell milk and cream in that city. The principal reason for this refusal is that the company's cream comes from an out-of-state producer whose standards do not meet the requirements of the Commonwealth of Massachusetts. It appears that the milk sold in the city meets the standards as required in G. L. c. 94, § 12, and the standards established under the rules and regulations of the licensing city."

You also set forth the definitions of "milk," "cream," and "milk products" in the regulations relative to the care of milk and milk products adopted by the city of Newton.

You also refer to a further regulation of the city of Newton reading as follows:

"No person, firm or corporation shall sell, offer for sale, hold in possession with intent to sell, exchange or deliver *any milk, skimmed-milk, cream*

or *milk products* in the city of Newton until he has made application for a license so to do and has been granted such a license by the milk inspector."

You now inquire whether or not the city may issue a license for milk only, or conversely, whether the city must issue a license for "milk and cream."

Unlike c. 94A, relating to the Milk Control Commission, separate standards for "milk" and for "cream" are to be found in c. 94, *e.g.*, see §§ 12, 16, and 21. The licensing sections specifically involved read in part as follows: (G. L. c. 94, §§ 40 and 41).

"SECTION 40. No person . . . shall deliver, exchange, expose for sale or sell . . . any milk, skimmed milk or cream in any town where an inspector of milk is appointed, without obtaining from such inspector a license . . . Whoever in such a town engages in the business of selling milk, skimmed milk or cream from any vehicle shall display conspicuously on the outer side of each vehicle so used the name and principal place of business of the licensee in Gothic letters not less than one and one-half inches in height. No person, other than a producer selling milk or cream, *or both*, shall display the word 'dairy' on any vehicle used by him . . . in the business of selling milk, skimmed milk or cream, unless such person has a license. . . ." (Emphasis supplied.)

"SECTION 41. An inspector of milk in any town, for the purposes mentioned in the preceding section and subject to the regulations established by the board of health of such town, may grant licenses to suitable persons, . . . If the applicant for a license fails to comply with any regulation of the board of health of the town where the application is made, a license may be refused until he has complied with such regulation; . . . If a license is so refused . . . an appeal may be taken to the department of public health, whose decision shall be final. . . ."

I find nothing in the applicable statutes which prohibits the city from issuing a license for milk nor do I find such a prohibition in that portion on the regulations of the city of Newton referred to in your letter. On the contrary, § 40 refers to "milk, skimmed milk *or* cream." Again § 40 states that "Whoever in such a town engages in the business of selling milk, skimmed milk *or* cream" and again "No person, other than a producer selling milk or cream, *or both*, shall display the word 'dairy' on any vehicle used by him or his authorized agent in the business of selling milk, skimmed milk *or* cream, unless such person has a license." Section 40 finally ends up with a sentence reading as follows: "Whoever in such town engages in the business of selling milk, skimmed milk or cream in a store, booth, stand or market place shall have his license conspicuously posted therein." If, as it appears to be the case, the inspector for the city of Newton has denied a license to sell milk on the grounds that its regulations provide only for a "milk and cream" license and the applicant's cream is not up to the required standards, and if the applicant appeals to your department under the provisions of § 41, your department may pass upon the validity of the regulation as construed by the inspector. (Attorney General's Report 1933, p. 69.)

In connection with the foregoing, you will note that the phrase "any milk, skimmed milk, cream *or* milk products" appears. The word "or" usually indicates an alternative.

It may be that there are valid reasons for the construction of the regulations which would permit the issuance of only "milk and cream" licenses. I am unaware of them and the statutes which I have referred to do not require such a ruling.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,

Assistant Attorney General.

A tax exemption under St. 1961, c. 464, cannot be granted to the New York, New Haven & Hartford Railroad if it discharged, etc., employees, other than as provided in the Act.

DEC. 26, 1961.

HON. ROY C. PAPALIA, *Chairman, Department of Public Utilities.*

DEAR SIR: — You have requested an opinion as to the present status of the application filed on June 30, 1961, by the New York, New Haven and Hartford Railroads, pursuant to St. 1961, c. 464.

If you have reference to the question of the eligibility of the railroad to receive the tax relief provided for in said St. 1961, c. 464, my answer is as follows:

If it appears that the railroad since July 1, 1961, has discharged, suspended or laid off employees in Massachusetts and elsewhere and that in no such case did the railroad seek or obtain the consent of a justice of the superior court of Massachusetts, the application of the debtor railroad should be rejected.

In order for the debtor railroad to qualify for the relief provided in St. 1961, c. 464, it must meet standards set forth by the supervisor of standards of railroad service and it must comply with the requirements set forth in the act.

Acts of 1961, c. 464, §§ 12D and 13, provide as follows:

"SECTION 12D. No railroad corporation receiving a tax exemption under this act shall discharge, suspend or lay off any person employed on the effective date thereof except for just cause and with the consent of a justice of the superior court after a hearing. Any railroad corporation violating the provisions of this section shall forfeit the tax exemption provided by this act."

"SECTION 13. This act shall take effect as of January first, nineteen hundred and sixty-one. Approved May 15, 1961."

In order to give effect to the legislative intent as expressed in §§ 12D and 13, and to prevent nullification of these sections of the act, the effective date as set forth in § 13 of the act must be the critical and effective date not only of the act but also of these sections.

In view of this reasoning, it would appear that the New York, New Haven and Hartford Railroad is not eligible to receive this relief in the year 1961.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,

Assistant Attorney General.

The negotiations for sales of land and buildings in Florida, purchasers being required to enter into long term rental and management contracts, can be handled only by licensed real estate brokers and salesmen.

Dec. 28, 1961.

Mr. John W. McIsaac, *Acting Executive Secretary, Board of Registration of Real Estate Brokers and Salesmen.*

Dear Sir: — You have recently requested an opinion as to whether or not the sale of so-called Investors Plans offered by General Development Investors Plans, Inc., requires the use of licensed real estate brokers as salesmen.

With your request you forwarded a copy of the company's Prospectus, a Specimen Certificate, petition to the Department of Public Utilities for approval of plan, company counsel's letter to the Department of Public Utilities dated October 13, 1961, order of the Department of Public Utilities authorizing sale of Plans through qualified securities salesmen, and the original letter of counsel addressed to your board dated November 30, 1961.

The Plan here involved is a package arrangement whereby a customer purchases a certain designated residence in the Port St. Lucie Country Club development in Florida, together with furniture and furnishings therefor, with the aid of a conventional or F. H. A. mortgage, if desired, and coincidentally enters into a contract with the company whereby the company will act as a rental and managing agent for the property for a minimum period of ten years. It is to be noted that at the time of purchase, the customer receives a deed to the house he has purchased and assumes the full risk of ownership. The selling agent is compensated by the seller in the amount of eight to ten per cent of the sales price of the house purchased, depending on the type of financing adopted. If the buyer wishes to sell his house, he may do so but the company will have a three-month exclusive sales agency and the house must be sold with and subject to the terms of the rental and management plan.

In the words of the Prospectus (p. 10), "The Plan purchaser will own the home and the Plan Company will act as agent in the maintenance, record keeping, rental and repair of the home." The purchaser under the terms of the Plan may occupy his home for any period of time during the year by notifying the company sixty days prior to January 31; otherwise, the company will allocate a four-week period, probably during an off-season period, for his personal occupancy. During the rest of the year the company will attempt to rent the house and credit the income to a fund for the owner's carrying costs and expenses.

General Laws c. 112, §§ 87 PP through 87DDD, relate to Registration of Real Estate Brokers and Salesmen and certain pertinent parts thereof are hereinafter set forth:

§ 87PP. Definitions.

" 'Real estate,' any and every estate or interest in land and the improvements thereon . . . whether or not said land is situated within the commonwealth."

" 'Real Estate broker,'. . . any person who for another person and for a fee, commission or other valuable consideration . . . sells, exchanges, purchases, rents or leases . . . any real estate. . . ."

§ 87QQ.

"The provisions of sections eighty-seven RR to eighty-seven DDD,

inclusive, shall not apply to the following: . . . a person buying, selling or otherwise dealing in any stock, bond or other security, or certificate of beneficial interest in any trust; . . ."

§ 87RR.

"Except as otherwise provided, no person shall engage in the business of or act as a broker . . . directly or indirectly, either temporarily *or as an incident to any other transaction*, or otherwise, unless he is licensed." (Emphasis supplied.)

§ 87SS.

"No license to engage as a broker . . . shall be issued to any applicant . . . unless he shall have satisfactorily passed a written examination conducted by the board; . . . .

"Such examination shall be prepared by the board to enable it to determine the competence of the applicant to transact the business of a broker. . . . In determining competence the board shall require proof that the applicant has a fair understanding of the principles of real estate practice, real estate agreements and principal and agent relations, of the rudimentary principles of the economics and appraising of real estate, and of the provisions of sections eighty-seven PP to eighty-seven DDD, inclusive. . . ."

Upon a careful examination of the Prospectus and other documents submitted describing the Plan it is my opinion that the type of transaction contemplated was intended to be covered by G. L. c. 112, §§ 88PP-87DDD. Each Plan purchaser makes a purchase of specific real estate in Florida and the transaction is distinguished from an orthodox real estate purchase and sale transaction only by the fact that the purchaser also enters into a long-term rental and management contract which the company undertakes to perform on stated terms and conditions for all the purchasers in the development. The exemption provided for in § 87QQ of persons selling stocks, bonds, securities and beneficial interests in trusts does not seem to be applicable to this Plan since, whether or not the rental and management plan is a "security," we cannot escape the fact that the direct sale of real estate is the basic part of the transaction. The rental and management plan, in my opinion, follows and is incidental to the house purchase.

The Legislature has plainly expressed an intention to protect the public against sales of real estate by persons who are unfamiliar with real estate practice and it is my opinion that licensed real estate brokers should be used in the Commonwealth for sales of these Plans.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By LAWRENCE E. COOKE,
Assistant Attorney General.

The provisions of G. L. c. 111, § 70, as to furnishing copies of records of hospitals of the treatment of patients are not applicable to such records of the Soldiers Home.

JAN. 2, 1962.

MR. JOHN L. QUIGLEY, *Commandant, Soldiers' Home, Chelsea 50, Mass.*

DEAR SIR: — In your recent letter, relative to the release of a copy of the medical record of one of your deceased patients, you state that an 83-year-old veteran was admitted to your institution in May of 1960, was discharged to the Veterans' Administration Hospital on May 1, 1961, for special treatment and expired at that hospital on May 5, 1961. In the meantime, his elder son was appointed conservator. You further state that you are now confronted with a request from the attorney of another son who desires to obtain a copy of the medical record of the deceased veteran. In the light of these facts you write:

"We should like to have advice . . . on our rights to release the copy of the record to the youngest son, without the attorney for the youngest son going through the 'summons procedure.' "

Section 70 of G. L. c. 111 deals with the subject of inspection and copies of hospital records. Prior to 1956, § 70 of c. 111 provided that:

"Hospitals supported in whole or in part by contributions from the commonwealth or from any town, incorporated hospitals offering treatment to patients free of charge, and incorporated hospitals conducted as public charities shall keep records of the treatment of the cases under their care and the medical history of the same . . . Section ten of chapter sixty-six . . ." (relating to copies for inspection of public records) "shall not apply to such records; provided that such records and similar records kept in the custody of the person in charge of the hospital may be inspected by the patient to whom they relate, or by his attorney upon delivery, of a written authorization from the said patient, and a copy shall be furnished upon his request and the payment of a reasonable fee; and provided, further, that upon proper judicial order, whether in connection with pending judicial proceedings or otherwise, or, except in the case of records of hospitals under the control of the department of mental health, upon order of the head of the state department having supervision of such hospital, and in compliance with the terms of said order, such records may be inspected and copies furnished on payment of a reasonable fee."

You will note that not all hospitals are covered by this section; only those referred to in the first sentence. Amendments have been made of the first sentence so that it presently reads as follows:

"Hospitals, dispensaries or clinics, and sanatoria *licensed by the department of public health* shall keep records of the treatment of the cases under their care and the medical history of the same." (Emphasis supplied.)

Section 70 as presently written also includes the provision that § 10 of c. 66 shall not apply to such records. The proviso relative to inspection and copies of records in its present form reads as follows:

". . . provided, that such records and similar records kept by the licensee may be inspected by the patient to whom they relate or by his attorney upon delivery of a written authorization from the said patient, and a copy shall be furnished upon his request and a payment of a reasonable fee; and provided, further, that upon proper judicial order, whether in connection with pending judicial proceedings or otherwise, or, except in

the case of records of hospitals under the control of the department of mental health, upon order of the head of the state department which issues the license and in compliance with the terms of said order, such records may be inspected and copies furnished on payment of a reasonable fee."

I am advised, and I hope reliably so, that your hospital is not licensed by the Department of Public Health. If this be true, this § 70 does not apply to your hospital and the answer to your question is that you are without power to supply copies of the medical record referred to in your letter. Indeed, if it were applicable, § 70 authorizes inspection only "by the patient to whom they relate or by his attorney upon delivery of a written authorization from the said patient." I understand the patient is dead and I assume that the attorney you refer to is not the decedent's attorney but that of one of his next of kin.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Under the amendments by St. 1961, c. 568, to G. L. c. 90, § 2, and G. L. c. 175, § 113A, permitting a transferor of a motor vehicle to attach his old plates to a newly acquired motor vehicle and protecting operations of, and continuing compulsory insurance on, the new vehicle for two days, cancellation of insurance proceedings begun prior to the transfer is not nullified, but a cancellation may not take effect until the expiration of the period.

JAN. 2, 1962.

MR. CLEMENT A. RILEY, *Registrar of Motor Vehicles.*

DEAR SIR: — You have recently requested an opinion as to the following question:

"Does St. 1961, c. 568, which becomes effective January 1, 1962, nullify any cancellation of insurance proceedings which have been commenced prior to the transfer as set forth in this chapter?"

Section 1 of St. 1961, c. 568, amending the fifth paragraph of § 2 of G. L. c. 90, provides that a person who has transferred ownership or lost possession of a registered motor vehicle and who intends to transfer the registration to a newly acquired motor vehicle may operate the newly acquired motor vehicle for two days following the transfer provided he attaches his number plates to the newly acquired vehicle.

Sections 2 and 3 of c. 568 of said act read as follows:

"SECTION 2. Section 113A of chapter 175 of the General Laws is hereby amended by inserting after provision (6) the following paragraph:— Notwithstanding the foregoing provisions, a policy covering a registered motor vehicle or trailer which is being transferred as provided in section two of chapter ninety shall continue in force and cover a newly acquired motor vehicle or trailer for a period beginning from the date of transfer of the registered motor vehicle or trailer until five o'clock post meridiem of the second registry business day following the date of transfer within the

same celendar year; provided, that the number plates issued upon registration of the transferred motor vehicle or trailer are attached to the newly acquired vehicle.

"SECTION 3. This act shall take effect at one minute past twelve o'clock ante meridiem on January first, nineteen hundred and sixty-two, and shall apply only to motor vehicle policies and bonds issued for the year nineteen hundred and sixty-two and subsequent years."

Provision (6) of G. L. c. 175, § 113A, is itself composed of five paragraphs, the first of which provides for continued auto insurance policy coverage for the legal representative of a bankrupt's estate and for the relatives and legal representative of a deceased for the life of the policy but contains at the end thereof the following sentence: "Nothing herein contained shall operate to nullify any cancellation proceedings which have been commenced prior to the death of the insured." This sentence, or one similar to it, is conspicuous by its absence from the final paragraph of (6) which has been added by St. 1961, c. 568. This final paragraph provides that the policy "*shall* continue in force" for two registry business days, without qualification.

In my opinion, provision (6) of § 113A of G. L. c. 175, as amended by St. 1961, c. 568, must be literally interpreted to mean that any cancellation proceedings which would otherwise become effective during this two-day period would be suspended until the end of said period, provided that all of the other terms and conditions of said c. 568 had been complied with. In direct answer to your question, it is my opinion that cancellation proceedings are not nullified by taking advantage of the law as amended by St. 1961, c. 568, but simply that any cancellation due to take effect during the two-day period is delayed until the end of that period.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

A member of a housing authority who is an official of a bank having interests in property the authority is to take, neither he, nor one of his family, owning stock in the bank, is not in violation of G. L. c. 12, § 26O; and if full disclosure is made and he refrains from acting as to property in which the bank is interested, there is no substantial conflict of interest within G. L. c. 268A (the Code of Ethics Law).

JAN. 8, 1962.

MR. LEO F. BENOIT, *Chairman, State Housing Board.*

DEAR SIR: — You have requested my opinion as to whether or not there is any violation of G. L. c. 121, § 26O or G. L. c. 268A, the Code of Ethics Law, in so far as the Chairman of the Andover Housing Authority is concerned.

It is my understanding that the chairman is employed by the Merrimack Valley National Bank as vice-president, but does not own any stock of the bank. Further, property of the bank is scheduled for acquisition by the Authority within the project area, and the bank holds a first mortgage on two parcels within that area.

Chapter 121, § 26O, reads in part as follows:

"No member, agent or employee of a housing authority shall, directly or indirectly, have any financial interest in any property to be included in, or any contract for property or materials to be furnished or used in connection with, any project of such housing authority. Whoever violates any provision of the preceding sentence shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both."

The Code of Ethics Law, c. 268A, contains in § 3 a rule in regard to conflict of interest, as well as a series of standards to be used in applying this rule. The rule reads as follows:

"No officer or employee of an agency should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest."

In *Commonwealth* v. *Albert*, 307 Mass. 239, the court ruled on G. L. c. 268, § 10, which provides that "a member of a city council or any branch thereof or of a municipal board of a city who is personally interested, directly or indirectly, in a contract made by the city council or by any branch thereof . . ." shall be punished. In defining the term "interest" the court held that it is one of broad significance and its meaning in any particular case depends upon the setting in which it is employed. The court went on to say: "The words 'personally interested' must be construed to mean interested in a pecuniary or proprietary sense."

The question of the existence of a conflict of interest in a situation such as that presented here is not clear-cut. If the chairman himself, or a member of his family, were the owner of property scheduled to be acquired by the Authority, it is clear that he would be required to resign or completely divest himself of his interest in the property. His position as vice-president of the bank, however, is not one which creates a pecuniary or proprietary interest in the property of the bank.

Accordingly, I am of the opinion that no conflict of interest exists with respect to c. 121, § 26O.

The wording of c. 268A, however, is broader with respect to the interest prohibited. It may be "financial or otherwise, direct or indirect." The chairman's interest as vice-president of the bank does come within the purview of this phrase. The statute then states, however, that this interest must not be in "substantial conflict with the proper discharge of his duties in the public interest." Nine "standards" are listed in § 4 of the statute to be used as guides in interpreting the rule. I would call your attention specifically to paragraphs (*b*), (*e*) and (*h*).

It is my opinion that no *substantial* conflict of interest exists in the instant case so long as the chairman has disclosed the nature of his interest (as provided in c. 268A, § 4(*j*)), and so long as he disqualifies himself from any discussion or decision relating to the bank property or other property on which, to his knowledge, the bank may hold a mortgage. I refer you to the declaration of intent of c. 268A, in particular to the following words:

"Government is and should be representative of all the people who elect it, and some conflict of interest is inherent in any representative form of government. Some conflicts of material interests which are improper for public officials may be prohibited by legislation. Others may arise in so many different forms and under such a variety of circumstances, that it

would be unwise and unjust to proscribe them by statute with inflexible and penal sanctions which would limit public service to the very wealthy or the very poor. For matters of such complexity and close distinctions, the legislature finds that a code of ethics is desirable to set forth for the guidance of public officers and employees the general standards of conduct to be reasonably expected of them."

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The psychiatrists to conduct the examinations provided for in G. L. c. 123A, § 4, of persons convicted of certain sex offenses are not required to be employees of the Commonwealth.

JAN. 9, 1962.

HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR SIR: — In your recent letter you present the following questions:

"Does G. L. c. 123A, § 4, as most recently amended, provide and require that the two psychiatrists under whose supervision the person is placed, and who must file with the court a written report of examination and diagnosis, and their recommendations for disposition of such person, be employees of the Department of Mental Health, *i.e.* the Commonwealth?"

No formal opinion is required in this instance because G. L. c. 123A, § 4, is silent and no other section is applicable nor in conflict. There is no specific intent of the Legislature within said section requiring the psychiatrists to be employed by the State.

The applicable language reads as follows:

". . . the court, may, upon its own motion or upon motion of the district attorney, prior to imposing sentence, commit him to the center or a suitable branch thereof for a period not exceeding sixty days for the purpose of examination and diagnosis under the supervision of not less than two psychiatrists who shall, within said period, file with said court a written report of such examination and diagnosis, and their recommendations for the disposition of such person. . . ."

Under the broad language of the above-quoted statute there is no limitation on the appointment of the two psychiatrists for a given case. The judge himself can name the two psychiatrists. In the absence of such designation by the judge, the Commissioner of Mental Health may assign such psychiatrists as are necessary and proper to carry out the mandate of the court. In his discretion, in the latter instance, the commissioner may assign a consultant or advisory physician or an employee of the Commonwealth who is qualified as a psychiatrist. The requirements of G. L. c. 123, § 53, do not apply.

The present practice of the commissioner in fulfilling his responsibilities under § 4 of c. 123A, as most recently amended, by using consulting psychiatrists who are not employees of the Department of Mental Health

is perfectly proper. Although not expressly provided for by statute, the practice is well within the legislative intent because said practice provides a wide variety of specialists at minimum cost to the Commonwealth and its taxpayers.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By THEODORE R. STANLEY,
Assistant Attorney General.

The body of a deceased patient of a State institution should be delivered only to the surviving spouse or next of kin; proof of rights and indemnity agreements should be required in doubtful cases.

JAN. 15, 1962.

MR. JOHN L. QUIGLEY, *Commandant, Soldiers' Home, Chelsea 50, Mass.*

DEAR SIR: — You have recently requested an opinion as to who is entitled to the possession of the remains of a deceased patient with particular reference to an immediate case which you describe as follows:

"In the instant case a 61-year-old veteran was admitted to our hospital on November 10, 1961. He listed as his next of kin a neighbor who occupied the apartment below him in a three-story dwelling owned by this veteran patient. The patient was discharged to Massachusetts Memorial Hospital for special laboratory and kidney procedures in mid-December and readmitted to our hospital on December 20, 1961. He expired at our hospital on January 5, 1962. At the time of his original admission on November 10 and again at his readmission on December 20, the patient confirmed the fact that his 'social condition' was 'single.' On both instances he gave the next of kin as the aforementioned individual. In accord with our usual policy we notify the 'next of kin' of the patient's having expired and expecting the individual to make the necessary funeral arrangements. In the interim we received a telephone call from the young lady visitor to the patient who identified herself as the patient's 'daughter' and instructing us that under no circumstances were the remains to be released to any other person. Upon inquiry at our Nursing Station we find that this young lady had visited the patient on several occasions and that he had introduced her once or twice to some of our nursing personnel as 'my daughter.'"

The general rule of law applicable to such situation was set forth in *Sheehan* v. *Commercial Travelers &c. Ass'n.*, 283 Mass. 543 at page 553 as follows:

"The right of possession of a dead body for the purpose of burial or other lawful disposition . . . is vested, at least in the absence of a different provision by the deceased, in the surviving husband, wife or next of kin."

The mere listing by the patient of an unrelated neighbor as his "next of kin" upon admission does not seem to me to be an adequate direction by the deceased that his body should be delivered over to such person where a claim for it is made by the person who is in fact his next of kin. In the specific case before you there seems to be some doubt as to whether the young lady who claims to be the deceased's daughter is in fact his daughter. In my opinion, you would be justified in asking her to provide some evi-

dence of the claimed relationship such as a birth certificate. If it is not practical to obtain this, you should require her to execute an affidavit under oath stating that she is the deceased's daughter. If there is still any doubt in your mind, you could properly ask her to execute an indemnity agreement whereby she would agree to indemnify and hold harmless you and the Commonwealth against any and all loss, damage, costs, expenses, claims, liabilities, suits, etc., which you or the Commonwealth may incur as a result of delivering the deceased's body to her as the next of kin.

I would suggest that such indemnity agreements be obtained in all situations where a deceased's body is delivered to a person who is not, or may not be, the next of kin of the deceased.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

The Trustees of the Soldiers Homes may provide for charges for care in proper cases.

JAN. 16, 1962.

MR. JOHN L. QUIGLEY, *Commandant, Soldiers' Home, Chelsea 50, Mass.*

DEAR SIR: — You have written me relative to a veteran patient who died at your hospital leaving a substantial sum of money on deposit and you request an opinion:

". . . whether there is any provision in the General Laws which would permit our making a charge against the estate for services rendered by our hospital or dormitory to the veteran patient. The veteran was allowed to accumulate this sum of money because of the services and facilities provided by the Commonwealth."

Your letter goes on to state that your Board of Trustees are considering the institution of a "Charge System" and that you are concerned whether there are any possible means of the Commonwealth being even partially compensated for the services rendered.

The answer to your question as to your right to charge for services rendered depends upon two things: first, the status of your patient, and, secondly, the obligations, by statute or otherwise, of your Soldiers' Home.

Chapter 452 of the Acts of 1931 is entitled, "AN ACT PROVIDING FOR THE TRANSFER AND CONVEYANCE TO THE COMMONWEALTH OF THE PROPERTY OF THE SOLDIERS' HOME IN MASSACHUSETTS AND ESTABLISHING A STATE BOARD OF TRUSTEES OF SAID HOME." Section 1 of c. 452 provides that:

"The acceptance from the Commonwealth by the trustees of the Soldiers' Home in Massachusetts, a corporation duly established by law, of the sum of three hundred thousand dollars, made available by item one hundred and sixty-one a of chapter two hundred and sixty-eight of the acts of the current year, for the construction of new buildings at said institution shall constitute a conclusive agreement on the part of said trustees, and their successors, to transfer and convey to the Commonwealth, on December first,

nineteen hundred and thirty-four, all real and personal property held by said trustees for the purposes of said institution. . . ."

Section 1 further provides that said trustees are authorized to transfer and convey such property except that the property included in the "legacy fund" and the "effects accounts" and held in trust by said trustees shall not be so transferred unless and until such transfer shall be authorized by a decree of a court of competent jurisdiction and that upon the transfer and conveyance of all the property of said Soldiers' Home, said corporation shall be deemed to be dissolved, and said home shall become a State institution.

Section 2 of c. 452 amends § 17 of c. 6 of the General Laws by adding the Board of Trustees of the Soldiers' Home in Massachusetts to other commissions and boards serving under the Governor and Council and subject to such supervision as the Governor and Council deem necessary and proper.

Section 3 of c. 452 inserts the present sections 40 and 41 of c. 6 of the General Laws relative to the organization of the Board of Trustees of the Soldiers' Home including its powers and duties.

In 1954 the General Court apparently made a serious effort to clarify the status of the Soldiers' Homes and those entitled to be cared for therein. General Laws c. 115A, §§ 1 to 5, outline in much detail those eligible for the benefits of the Homes. Section 5 of c. 115A provides, among other things, that:

"Nothing in this chapter shall be construed to prevent the trustees of the Soldiers' Home in Massachusetts and the trustees of the Soldiers' Home in Holyoke from adopting, issuing and promulgating reasonable rules and regulations governing out-patient treatment at, admission to, and hospitalization in, said Homes; . . ."

Whether in a given case your Home has a right to charge the patient for its services depends upon several matters. Is your Home obligated by Federal or State law to supply hospitalization services gratis? In many such cases, of course, there is no obligation to pay. *Worcester* v. *Quinn*, 304 Mass. 276.

Speaking generally, where there is no obligation to furnish hospitalization services gratis, the right to charge depends upon the arrangements between the Home and the patient. If the arrangement is to pay, the hospital may charge. If no express arrangement is made, then payment may be claimed if as a reasonable person the patient should have known that payment was to be required and the Home reasonably expected to receive compensation. Naturally the Home cannot create a legal obligation to pay where none existed in the first place. I am aware of the existence of c. 387 of the Acts of 1960 authorizing deductions from unclaimed funds of former patients of Soldiers' Homes of amounts "obligated to the Commonwealth for support furnished . . . at such Home. . . ." I am not aware of any express general provision of law relative to charges for hospitalization services at Soldiers' Homes. You have not advised me of any rule or regulation covering the subject although you state that compensation is now under consideration by your Board of Trustees.

In the case you refer to in your letter, you feel that an obligation is or should exist. The Home must be represented in the probate court in order to protect your claim against the distribution of the estate. You will

understand that the general subject matter we have discussed must of necessity be treated in a general way for the present, leaving specific instances to be separately dealt with. I suggest that your Board of Trustees in considering the entire subject matter will keep in mind the obligation, if any, which your Home owes to the Federal Government and also the Commonwealth because of Federal and State grants to it. As your board proceeds, I shall be glad to discuss the situation with you from time to time.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Civil Defense Act permits the temporary re-employment by the Commonwealth of a person retired from a municipality, but such a person can be paid only the difference between his retirement allowance and the salary for the position; allowance cannot be waived.

JAN. 19, 1962.

HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR SIR: — You have requested an opinion of the following questions:

"1. May an agency of the Commonwealth re-employ in accordance with St. 1950, c. 639, § 9(*h*), as amended, an individual who is retired or pensioned from a political subdivision, but who is not retired or pensioned from an agency of the Commonwealth?

"2. If the answer to question number one is in the affirmative, may we re-employ the physician to whom I make reference at full compensation for the position which he seeks; or at full compensation for the position which he seeks less the retirement allowance granted him by the city of Boston, payment of which he has voluntarily waived until further notification by him?

"3. If the answer to question number two is in the affirmative, in so far as it pertains to full compensation for the position which he seeks, what protection is necessary to safeguard the interest of the Commonwealth, if during the period of re-employment this individual should revoke his waiver of retirement allowance payments from the city of Boston?"

Acts of 1950, c. 639, § 9, so far as material, reads as follows:

"Notwithstanding the provisions of chapter thirty-one of the General Laws, or any other provision of law affecting civil service, and the rules made thereunder on and after the declaration of a state of emergency, the director of civil service, supported by a majority vote of the civil service commission . . .

"(*h*) Shall approve in writing the temporary re-employment of any former officer or employee of the Commonwealth or of any political subdivision thereof who has been retired under any retirement or pension law, or who has been separated from the public service by reason of superannuation or disability without a retirement allowance or pension to any position or employment subject to chapter thirty-one of the General Laws. *Any person so employed shall receive full compensation for such services less*

any retirement allowance or pension received by him. The written approval of the appointing officer, board or committee shall be required in the re-employment of such former officers or employees to any office or employment not subject to said chapter thirty-one. . . ." (Emphasis supplied.)

Although the provisions of paragraph (*h*) are not as clear as would be desirable, my answer to your first question is in the affirmative.

With reference to your second question, it is to be noted that paragraph (*h*) of § 9 of c. 639 specifically provides that a person re-employed thereunder is to be paid only the difference between the salary for the position and the retirement allowance or pension. There are no provisions in the paragraph permitting the payment of the full salary for the position upon a waiver of his retirement benefits by the employee such as are contained in G. L. c. 32, § 91, which specifically provides that retired persons appointed to certain positions shall be paid the full salaries therefor, provided they waive and renounce their retirement benefits. The provisions of G. L. c. 32, § 91, referred to, it was ruled in an opinion to the State Comptroller dated September 8, 1959, "must be considered as stating the only conditions under which the waiver or renunciation of a pension or retirement allowance can operate to permit a retired person to be re-employed." In accordance with that opinion, and in view of the express provision of St. 1950, c. 639, § 9(*h*), that a retired person re-employed thereunder shall be paid only the difference between the salary for the position in which he is re-employed and his retirement allowance or pension, and the absence of a provision permitting the payment of the full salary if the retirement allowance or pension is waived, I advise you, in answer to your second question, that a retired person re-employed under said § 9(*h*) is to be paid only the difference between the full compensation for the position in which he is re-employed and his retirement allowance or pension, and his waiver of his retirement benefits would not permit the payment of the full compensation or salary of the position to him without deduction of the retirement allowance or pension.

In view of my answer to your second question your third question does not require consideration.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General.*

By JAMES J. KELLEHER,
Assistant Attorney General.

Only municipal by-laws or ordinances regulating the operation of motor boats on local waters may be approved by the Director of the Division of Motor Boats under G. L. c. 90, § 15. Any authority of the Lake Boone Commission under St. 1941, c. 712, to regulate motor boats on the lake has been superseded.

JAN. 19, 1962.

MR. WILTON VAUGH, *Director, Division of Motorboats.*

DEAR SIR: — In your letter of recent date, relative to the Lake Boone Commission, you state that:

"The Lake Boone Commission feels that according to St. 1941, c. 712, the commission is authorized to make regulations affecting motorboats on

Lake Boone without the necessity of submitting these regulations to the towns of Stow and Hudson to be adopted as by-laws.

"This division has felt that St. 1960, c. 275, required that such regulations be adopted as by-laws of the towns involved before the approval of this division could be granted."

You now request my opinion as to the interpretation of the last sentence of G. L. c. 90B, § 15(*b*), as inserted by St. 1960, c. 275, § 2.

Chapter 712 creates an unpaid special commission to regulate the use of the waters of Lake Boone and defines its powers and duties. Among other things, the commission is empowered to establish rules and regulations for the protection and policing of Lake Boone and regulating the use of motor and other boats and canoes therein, and regulating the conduct of persons upon, or bathing therein. Moreover, it authorizes the commission to make rules and regulations relating to the conduct of the business of renting boats and canoes used on the lake and to the use and maintenance of bathing houses adjacent thereto.

Chapter 275 of the Acts of 1960, entitled "AN ACT REGULATING THE USE OF MOTORBOATS AND REQUIRING THE REGISTRATION THEREOF ON CERTAIN WATERS OF THE COMMONWEALTH," has an emergency preamble stating in substance that the measure is to provide forthwith for the numbering of certain motorboats and the promotion of boating safety on the territorial waters of the Commonwealth.

Section 1 amends G. L. c. 16 by adding a new § 12 creating within the Registry of Motor Vehicles a Division of Motorboats with a director appointed by the Governor with the approval of the Council. Section 2 amends the General Laws by adding a new c. 90B, which contains numerous sections providing for the registration of motorboats with the director and also covering the operation of motorboats. Section 4 provides that:

"Any ordinance, by-law or regulation of any city, town *or other public body or authority* relative to the identification of motorboats . . . shall become null and void upon the effective date of this act, and any such ordinance, by-law or regulation relative to the *operation* of motorboats . . . shall become null and void on the ninetieth day following said effective date." (Emphasis supplied.)

Section 15(*a*)(*b*), inserted by § 2 of c. 275, provides in substance that nothing contained in § 15 shall be construed as prohibiting a city or town from regulating, by ordinance or by-law not contrary to c. 275 or to any rule or regulation made thereunder, vessels subject to the provisions of the chapter on such waters of the Commonwealth as lie within the city or town, or any activity regulated by the chapter. The concluding sentence of § 15(*b*) provides that "Such cities and towns may, by joint action, provide for such regulations for such waters lying in two or more cities or towns."

In my opinion the provisions of c. 275, so far as they are inconsistent with the provisions of c. 712, supersede the same. As the Superior Court said in the case of *McDonald* vs. *Superior Court*, 299 Mass. 321, 324, in dealing with a somewhat analogous situation, "That problem was Statewide. There was importance in uniformity in the law to govern the administration of the subject. A statute of that nature displays on its face an intent to supersede local and special laws and to repeal inconsistent special statutes."

Section 15(*b*) endeavors to make provisions authorizing in the future further local legislation with the approval of the director. The concluding sentence in that section to which you refer provides specifically that such *cities and towns* may by joint action provide for such regulations for such waters lying in two or more cities or towns. This sentence does not include regulations by any other public body or authority such as the Lake Boone Commission.

I am, therefore, constrained to rule that the Lake Boone Commission is presently without power to promulgate and enforce rules and regulations which are in any way inconsistent with the provisions of c. 275 or rules and regulations of the director issued under authority thereof.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Special statutory authority would be required to authorize the Metropolitan District Commission to make a rule authorizing its police to tow cars for violations of traffic regulations or which are impeding the removing and clearing of snow.

JAN. 19, 1962.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — Your letter of recent date requests my opinion as to the right of your commission, under the provisions of St. 1961, c. 322, to make a rule authorizing your police to tow cars for violation of traffic regulations or which are impeding the removal and clearing of snow from parkways and boulevards during or after storms, and charge fees therefor.

Chapter 322 of the Acts of 1961, is entitled "AN ACT AUTHORIZING THE TOWING OF VEHICLES FROM CITY AND TOWN WAYS WHERE SUCH VEHICLES ARE PARKED OR STANDING IN VIOLATION OF THE LAW." It inserts by amendment a new § 22D of G. L. c. 40, which in substance authorizes a *city or town* which accepts this section to establish traffic regulations covering the subject matter to which you refer. It should be noticed, of course, that this statute only applies to a *city or town* which accepts this section. It does not purport, as you have seen, to authorize the Metropolitan District Commission to make rules or regulations of the kind in which you are interested.

As you are doubtless aware, the General Court by the provisions of St. 1961, c. 524, authorized the Department of Public Works by rule or regulation to empower specified officers to tow and remove motor vehicles obstructing or illegally parked on "a State highway." Metropolitan District boulevards, however, are not "State highways." *Medford* v. *Metropolitan District Commission*, 303 Mass. 537. As you are also doubtless aware, G. L. c. 40, § 21(16), authorizes cities and towns to enact ordinances or by-laws permitting the removal and towing of vehicles interfering with snow removal; yet in my opinion neither this authority nor the powers conferred by St. 1961, c. 322, are powers that cities and towns have over

public ways "in general" which your commission are accorded by virtue of the last sentence of G. L. c. 92, § 35.

The statutory pattern relative to the subject as to which you inquire apparently does not contain any express provision authorizing the activities you refer to. I am unable, therefore, to assume that the general provision you cite in §§ 37 and 61 of G. L. c. 92 were intended to authorize the towing and removing of motor vehicles such as you describe.

It is my opinion, therefore, that your commission is not authorized under the provisions of St. 1961, c. 322, to make a rule authorizing your police to tow cars for violation of traffic regulations or which are impeding the removal and clearing of snow from parkways and boulevards.

In the light of the foregoing, perhaps the General Court may consider the advisability of clarifying legislation so as to make it clear beyond any doubt that your commission has the necessary towing authority over the ways under its control. Conceivably, it might be the general impression that this had been accomplished. However, in the present state of the pertinent statutes, the result desired has not been achieved, at least as far as your commission is concerned.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Fines for violations of traffic regulations at the University of Massachusetts must be paid into the Treasury of the Commonwealth.

JAN. 24, 1962.

MR. JOHN W. LEDERLE, *President, University of Massachusetts.*

DEAR SIR: — In your recent letter, relative to the disposition of student traffic fines, you state that on October 2, 1951, the executive committee of the Board of Trustees of the University of Massachusetts voted to authorize the treasurer of the University to assess students fines for violation of parking and traffic regulations at the University, and that such fines would be paid into the treasury of the Commonwealth; that students through their Student Senate made a study of the problem and suggested that the students themselves would like to enforce student traffic violations.

At a meeting of the Board of Trustees of the University on February 20, 1958, it was —

> "VOTED: To approve the request of the Student Senate to add the income from campus traffic fines to the trust fund account entitled 'The University Scholarship Fund' and to treat this income as a student activity fund."

Thereafter, fines collected for violation of campus traffic regulations were no longer paid into the treasury of the Commonwealth but were deposited in the University Scholarship Fund, a trust fund established under the provisions of G. L. c. 75, and disbursements were made as authorized by the University Scholarship Committee.

On August 17, 1960, the Comptroller addressed a letter to your treasurer reading as follows:

"I have your letter of August 15 in reply to letter from this office dated July 11 pertaining to student traffic fines.

"Whereas the State Auditor in his Report No. 60–20 stated that traffic fines collected by the University were not being reverted to the State Treasury as income but were credited to the Trust Fund account 'University Scholarship Fund' and our letter of July 11 expressed the opinion that this office considered it income to the Commonwealth in accordance with Article LXIII of the Constitution of the Commonwealth, it is suggested that in order to resolve this question you present the facts to the Attorney General for his opinion."

In this state of affairs you request my opinion as to whether the fines before mentioned should be remitted to the State Treasurer. Article LXIII of the Articles of Amendments to the Constitution of Massachusetts provides that:

"All money received on account of the Commonwealth from any source whatsoever shall be paid into the treasury thereof."

In *Opinion of the Justices,* 334 Mass. 716, at page 718, the Supreme Court said:

"It is manifest that art. 63 was designed to place the fiscal operations of the Commonwealth as far as possible on a strict budget plan by which all money received on account of the Commonwealth from any source should be paid into its treasury and all proposed expenditures of the Commonwealth should be included in some appropriation bill."

General Laws c. 75, § 9, provides that the trustees shall, on behalf of the Commonwealth, manage and administer the University and all property, real and personal, belonging to the Commonwealth and occupied or used by the University.

Section 10 provides that the trustees shall make reasonable rules and by-laws consistent with law, with reasonable penalties, for the government of the University and for the regulation of their own body.

Section 7 provides that the trustees shall administer property held in accordance with special trusts.

Section 5A provides that the receipts from student activities, including the operating of the University store, student operation of the home economics practice house, dramatics, debating, musical clubs, band, athletics and other like activities, shall be retained by the trustees in a revolving fund or revolving funds and shall be expended as the trustees shall direct in furthering the activities from which the receipts were derived. Not, however, in contravention of the requirements of § 1 of Article LXIII.

It appears from your letter and the enclosures that, in the first instance, the trustees themselves handled the assessment and collection of fines for violation of your student campus traffic regulations, and the proceeds were turned over to the Treasurer of the Commonwealth; that in 1958 the trustees voted to add the income from campus traffic fines to the trust fund account entitled, "The University Scholarship Fund," and to treat this income as a student activity fund, since which time the fines have been treated accordingly.

At the outset, it is clear that, having in mind the provisions of Article LXIII of the Amendments to the Constitution and of G. L. c. 75, § 5A, a cardinal principle of State finance is, as stated in the *Opinion of the Justices,* that "*all* money received on account of the Commonwealth from any source should be paid into its treasury and all proposed expenditures

of the Commonwealth should be included in some appropriation bill." Even § 5A of c. 75 relating to receipts from student activities is made subject to the Constitutional Amendment above referred to.

The funds you refer to result from the use or *misuse* of property belonging to the Commonwealth. The trustees of the University, under the express provisions of § 9, shall manage and administer the University and all real and personal property belonging to the Commonwealth. By virtue of the provisions of § 10, the *trustees* shall make reasonable rules and by-laws consistent with law, with reasonable penalties, for the government of the University and for the regulation of their own body. It is my opinion that the trustees acted beyond their authority in voting as they did on February 20, 1958. *A.L.A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 495.

A reading of § 5A requires, if not justifies, this conclusion. It says, "all receipts from student activities, including the operation of the university store . . . dramatics, debating, musical clubs, band, athletics *and other like activities*, shall be retained by the trustees in a revolving fund . . . and shall be expended as the trustees shall direct in furthering the activities from which the receipts were derived. . . ." (Emphasis supplied.) It is hard to believe that the General Court intended that the funds received from the fines for violation of campus traffic regulations should be used in "furthering" the activities from which the receipts were derived, namely, violation and further indiscriminate continued violation of the campus traffic regulations.

Under all the circumstances, in view of the constitutional provisions above referred to, and the provisions of law relating to the trustees and their responsibilities, and bearing in mind the laudable purposes which your trustees undoubtedly had in mind in entering into the arrangement which they have, it is my opinion that the monies received from fines referred to should be paid to the Treasurer of the Commonwealth.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

The Department of Public Works can expend funds appropriated by St. 1961, c. 544, for a special capital outlay program for the Commonwealth, with funds contributed by the town of Provincetown, for the repair of the town-owned MacMillan Wharf.

JAN. 29, 1962.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — In your letter of recent date relative to the so-called MacMillan Wharf in Provincetown you state that your department has been requested to repair the wharf, which is a town-owned wharf located in Provincetown Harbor, and that the town is prepared to contribute fifty per cent to the cost of the work. You request my opinion as to whether your department has the authority under G. L. c. 91, to finance the State's

share of the cost of such work from Item 8262–22 of St. 1961, c. 544, § 2.

Item 8262–22 reads as follows:

"For projects for the improvement of rivers, harbors, tidewaters, foreshores and shores along a public beach, as authorized by section eleven of chapter ninety-one of the General Laws, and for construction, reconstruction or repair of drains, to be used in conjunction with any federal funds made available for the purpose; provided, that all expenditures, except the cost of surveys and the preparation of preliminary plans, for work undertaken hereunder, including the cost of engineering during construction, shall be upon condition that at least fifty per cent of the cost is covered by contributions from municipalities or other organizations or individuals except that, in the case of dredging channels for harbor improvements, at least twenty-five per cent of the cost shall be so covered."

General Laws c. 91, § 11, in its present form reads in part as follows:

"The department shall undertake such construction and work for the improvement, development, maintenance and protection of tidal and nontidal rivers and streams, great ponds, harbors, tide waters, foreshores and shores along a public beach as it deems reasonable and proper, and for this purpose shall have the same powers conferred upon it by section thirty-one . . . In selecting the places to do such work, the department shall consider the general public advantage of the proposed work, the local interest therein as manifested by municipal or other contributions therefor, the importance of the industrial or commercial and other interests to be especially served thereby, and any other material considerations affecting the feasibility, necessity or advantage of the proposed work or the expenditure therefor. No work authorized by this section shall be begun until after a public hearing has been held and a survey and an estimate of the cost has been made."

The question of whether or not town wharfs may be repaired under the provisions of G. L. c. 91, § 11, was answered in the affirmative by Attorney General George Fingold. Attorney General's Report 1953, p. 38. I see no reason why this opinion should not be followed, particularly since the Legislature has since amended this section without altering the language upon which Attorney General Fingold's opinion was based.

I would call to your attention, however, the requirements of considering the general public advantage, etc., and of a public hearing contained in the last two sentences of § 11 as well as the requirement of approval of contracts by the Governor and his Council contained in § 31, which seems to apply to the contemplated work.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A limitation of access from public ways imposed by the Massachusetts Turnpike Authority on land acquired by it for the turnpike should be disregarded in determining the value of the land for purposes of compensation for a taking of the land for State highway purposes.

JAN. 29, 1962.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have informed me that your department has taken a parcel of land in Weston for State highway purposes, title to which was in the Massachusetts Turnpike Authority.

It has been explained to us that the parcel in question is part of a larger parcel between Route 128 and the end of the Turnpike acquired by the Turnpike Authority for future Turnpike purposes. The parcel borders in part upon Route 128 and in part upon Riverside Road, a public way in Weston.

Your letter also stated, "The Massachusetts Turnpike Authority in a subsequent Order of Taking #118, dated December 7, 1955, laid out a Limited Access line, with exceptions, circumscribing the previously acquired tract thereby restricting access thereto or therefrom to any public way other than the Toll Road itself."

You request my opinion on the following questions:

"(1) Is it your opinion that the Massachusetts Turnpike Authority would have the right to make an alteration that would create access to Riverside Road and allow the Authority to sell any portion of its land not required for highway purposes?

"(2) If the Massachusetts Turnpike Authority has the right to make the above changes, which of the following conditions should be considered in the appraisals?

"(a) Value only to the Massachusetts Turnpike Authority (No access to a public way).

"(b) The possibility of the Massachusetts Turnpike Authority to exercise their rights and create access to this public way thus creating salable property."

The statute establishing the Turnpike Authority and authorizing it to lay out and construct the Turnpike as a toll express highway, St. 1952, c. 354, contains the following provisions:

"SECTION 5

"The Authority is hereby authorized and empowered

"(l) To designate the locations, and establish, limit and control such points of ingress to and egress from the turnpike as may be necessary or desirable in the judgment of the Authority to insure the proper operation and maintenance of the turnpike, and to prohibit entrance to the turnpike from any point or points not so designated. . . ."

"SECTION 7

"The Authority may sell the buildings or other structures upon any lands taken by it, or may remove the same, and shall sell, if a sale be practicable, or if not, shall lease, if a lease be practicable, any lands or rights or interest in lands or other property taken or purchased for the purposes of this act, whenever the same shall, in the opinion of the Authority, cease to be needed for such purpose. The proceeds of any such sale or lease shall be applied toward the cost of the turnpike or deposited to the credit of the

sinking fund for the turnpike revenue bonds issued under the provisions of this act. . . ."

In answer to your first question I advise you that under the provisions just quoted the Authority had the power to change the line of limited access between the Turnpike and Riverside Road at any time, and to relocate the line of access so as to permit access to the parcel in question from Riverside Road, and egress therefrom to said way, and the Authority also had the power to sell that parcel if in its opinion the land should cease to be needed for the purposes of the act.

In answer to your second question, I advise you, therefore, that in making appraisals of the parcel taken from the Turnpike Authority consideration must be given to the possibility of the Authority exercising its powers so as to provide access to and from the parcel and Riverside Road.

It is to be noted that the limitation of access to the parcel imposed by the Authority was imposed by the Authority for *its own benefit*, and that the limitation of access applied only to the public and did not prevent access to and from Riverside Road and the land by the Authority or persons having its permission.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General.*

The fee for filing a certificate of a change in corporate capitalization resulting from eliminating one class of stock and increasing another class is to be computed on the net amount of increase in capital.

FEB. 12, 1962.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth.*

DEAR SIR: — In your letter of recent date, relative to the correct fee for the filing of certain corporation papers, you state that $25 was paid and accepted as the filing fee, the understanding being that an additional fee of $355 would be paid if that amount were found to be properly due under the circumstances.

It appears that the certificate filed called for the reduction and increase of capital stock. The certificate reflects a single resolution to that effect voted by the stockholders at a meeting on December 26, 1961. The resolution in effect eliminated 6,817 shares of Convertible Preferred Stock, par value $100, from the authorized capital stock of the corporation (a reduction of capital of $681,700) and at the same time authorized 710,000 additional shares of Common Stock, par value $1 (an increase of capital of $710,000).

It would seem that the whole resolution taken together results in a net increase in capital of $28,300. The minimum fee of $25, in accordance with the provisions of G. L. c. 156, § 54, was paid to you.

You now request my opinion as to whether a further fee of $355 is payable for the full amount of the newly authorized stock.

In the case of a combined decrease and increase of capital, it was ruled by this office in an opinion dated August 3, 1945, that the corporation need not pay a fee on the entire amount of the increase but only on the *net* increase with a credit for the full amount of the reduction. Attorney General's Report, 1946, p. 30. In a situation quite similar to the one before you, Attorney General Barnes said that:

"In my opinion, the Legislature intended that a corporation should pay a fee for filing a certificate providing for the *net* increase in capital stock."

See also *Commonwealth* vs. *United States Worsted Co.*, 220 Mass. 183.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

An application for examination for registration as an embalmer or funeral director may be accepted from a person who is under twenty-one years of age.

FEB. 21, 1962.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — In your letter of recent date, relative to the Board of Registration in Embalming and Funeral Directing, you pose the following question:

"Under G. L. c. 112, § 83, has the Board the authority to *accept for examination* for registration as Embalmer or Funeral Director, a candidate who has *not* as yet reached his twenty-first birthday."

General Laws c. 112, § 83, provides that applications for registration as embalmers, funeral directors or apprentice embalmers, and for establishment certificates, shall be made on blanks furnished by the board. The statute contains no age limitation for the filing of the application. It does, however, provide that:

"No person shall be *registered* by the board as an embalmer unless *he has been found by the board upon examination to be twenty-one years of age or over*, a resident of this Commonwealth, a citizen of the United States, of good moral character; . . ." (Emphasis supplied.)

Section 83 contains many other requirements for registration and certification.

Section 83 further provides that:

"No person shall be *registered* by the board as a funeral director unless *he has been found by the Board upon examination to be twenty-one years of age or over*, a resident of this Commonwealth, a citizen of the United States, of good moral character. . . ." (Emphasis supplied.)

Many additional requirements are contained in § 83 relative to applicants for registration as funeral directors.

Section 83 also provides, as to both embalmers and funeral directors, that upon payment of ten dollars an applicant for registration as an embalmer or funeral director shall be examined by the board and, if found to be qualified, shall be registered by the board and receive a certificate thereof signed by the chairman and the secretary of the board.

While the question you pose may not be free from doubt, reading the statute as it is written, among the other numerous qualifications for

examination § 83 requires only that the applicant has been found by the board upon examination to be 21 years of age or over. There may be reasons why an applicant should be 21 years of age at the time of filing his application. Nevertheless, there is no such requirement apparent in this legislation.

Accordingly, I answer your question in the affirmative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Board of Registration of Certified Public Accountants cannot provide by rule for reciprocity certificates for non-residents.

MARCH 1, 1962.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — Your letter of recent date relates to the Board of Certified Accountants and its jurisdiction over non-residents.

In your letter, referring to reciprocity certificates, you state that the board grants reciprocity certificates to certified public accountants in other States who become residents of Massachusetts and practice in this State for at least one year immediately preceding the filing of their applications, as noted in the enclosed copy of its rules on reciprocity. In the light of that fact, it poses the following question:

"Since this is a rule of the board rather than part of the law, may we grant reciprocity certificates to non-residents of Massachusetts who have clients in this State?"

The Board of Registration of Certified Public Accountants, as you are doubtless aware, is constituted under the provisions of G. L. c. 13, §§ 33–35, inclusive. Its powers and functions are set forth in §§ 87A–87E, inclusive, of G. L. c. 112.

By the provisions of § 87A, the Board of Registration of Certified Public Accountants is provided with the power to "make such rules and regulations as are necessary for the proper conduct of its duties." Section 87B provides that "The Board shall examine any citizen of the United States *resident in the Commonwealth* . . . who may apply for a certificate . . ." (Emphasis supplied.) It is, generally speaking, a well-established rule of statutory construction that the power to make rules and regulations is to be construed as power to make regulations implementing the jurisdictional functions of the rule-making body but not increasing the jurisdiction of that body. As observed in § 87B, the right of the board to examine is limited to "any citizen of the United States *resident in the Commonwealth.*" (Emphasis supplied.) In dealing with the subject of reciprocity, it may be noted in passing that there is a complete absence of any provision in the section to which I have referred dealing with the registration of certified public accountants, or of any reference to reciprocal activities between the board and similar boards in other States. I cannot assume that such omission was by inadvertence. Such an assumption is

not to be implied, particularly in view of the fact that the statutes relative to many of the boards under the jurisdiction of the Division of Registration contain careful, detailed provisions authorizing reciprocal activities.

Without going into the matter in too great detail, it may be noted that § 2 of c. 112 authorizes the Board of Registration of Physicians and Surgeons to grant certificates of registration as qualified physicians to physicians who have been licensed or registered upon written examination in another State. Section 16 of c. 112 authorizes the registration or licensing of chiropodists who have been examined in other States, under the circumstances therein set forth. Section 23D provides, under the circumstances therein set forth, for the registration of physical therapists who have been registered under the laws of other States. Section 24 authorizes the granting of certificates of registration to pharmacists who have been registered by examination in other States. Section 48 provides for the registration of dentists from other States, under the circumstances therein set forth. Section 68 provides for the registration of optometrists from other States. Section 73E authorizes local licensing of opticians licensed or registered in another State. Section 76 authorizes local registration or licensing of out-of-State nurses.

Section 81B authorizes the approval of schools for nurses or practical nurses in other States. Section 81O provides for the issuance of certificates of registration for professional engineers of other States. Section 85A deals with the subject of reciprocal agreements with licensing authorities of other States to allow conduct of funerals therein. Section 87Z of c. 112 provides specifically for reciprocal registration. Section 87NN authorizes the issuance of certificates of registration without examination to persons holding certificates of registration or licenses as sanitarians under the laws of another State. Section 87WW provides for reciprocal licensing of non-resident real estate brokers and salesmen. Section 87OOO provides for reciprocal licensure of persons practicing electrolysis.

In view of the foregoing, the omission of any reciprocal licensing provisions of §§ 87A–87E, inclusive, becomes most significant. Therefore, I am constrained to answer your question in the negative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The town of legal residence of a physically handicapped child and not the regional school district of which it is a member is liable for the cost of furnishing instruction to the child while in a hospital in another municipality.

MARCH 1, 1962.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — You have recently requested an opinion regarding the proper allocation of tuition cost for a handicapped child residing in the town of Wrentham, which is a member of a regional school district. You pose the question as follows:

"Wrentham students, grades 7–12, attend the King Philip Regional High School which is located in Wrentham. This Regional High School

also serves the towns of Plainville and Norfolk. If a Wrentham student attending the King Philip Regional High School becomes a patient at the Children's Medical Center, under the category of physically handicapped, is the town of Wrentham liable for the tuition cost or is the Regional School District liable?"

You further state that the regional school agreement has no provision relating to this matter and that the child involved is a student of the regional school.

General Laws, c. 71, § 46A, in its pertinent parts provides:

". . . In any town where there is a child of school age resident therein . . . so physically handicapped as to make attendance at a public school not feasible . . . the school committee shall . . . with the approval in each case of the departments of education and public health, offer instruction to each such child in his home or at such place and under such conditions as the committee may arrange. . . .

"If a town furnishing instruction under this section to a child confined in a hospital . . . located therein is not the legal residence of the parent or guardian of such child, the town where the parent or guardian has a legal residence shall pay tuition to the town furnishing such instruction. . . ."

General Laws, c. 69, § 29B, provides as follows:

"One-half of the cost of the expenses of the instruction, training and support of the children in the special classes . . . provided under section forty-six, forty-six A or forty-six H of chapter seventy-one . . . actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be reimbursed to the towns or any regional school district by the Commonwealth upon approval of the department and certification by it that such classes . . . "meet the standards and requirements prescribed by it."

It would appear from your letter that the Wrentham child while at the Children's Medical Center in Boston has been provided with instruction by the city of Boston and the question now is whether the town of Wrentham or the regional school district, of which Wrentham is a member, is liable to reimburse Boston under the provisions of c. 71, § 46A.

First, it would seem to me that your department is not involved in this problem: § 29B of c. 69, requires you to "reimburse" either the town or the regional school district so that your obligation does not arise until one or the other has actually made the payment under c. 71, § 46A, and then the fact of payment will determine whom you reimburse. In other words, this is a matter between the town and the regional school district for their determination.

However, in my opinion, the providing of special instruction at a hospital outside of the regional district is not the sort of matter that the regional school district plan is primarily designed to handle. Unless the regional school district agreement specifically places the liability for this type of expense on the district, I would be inclined to think that the town, in this case Wrentham, would retain the liability in accordance with the literal wording of § 46A of c. 71.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Lawrence E. Cooke,
Assistant Attorney General.

One whose service with the Commonwealth is uninterrupted is entitled upon return to a position subject to the vacation rules to the vacation credits he had at the time of accepting an appointment to a position not subject to the rules.

March 1, 1962.

Hon. Charles Gibbons, *Commissioner of Administration and Finance.*

Dear Sir: — You have requested an opinion with reference to the vacation credits to which a State employee will be entitled who held an office subject to the rules and regulations under G. L. c. 28, § 7, governing vacation allowances of State employees, who was appointed by the Governor to an office exempted from those rules, and who now is to return to his former position.

Your inquiry is as to the effect of the rules under G. L. c. 28, § 7, on the vacation credits to which the person referred to had a right on the date of his appointment to the exempt position, but which, because of his appointment, could not be granted to him while he held the position.

It appears that there is a Rule LV-5 which you paraphrase in your letter as stating that, "Vacation credits which are unused after a period of two years are cancelled. . . ." However, the rule referred to does not contain any such direct wording. The rule states, so far as material, that, "The department head is charged with the responsibility of seeing that vacation is taken in the succeeding year in order that the employee may not lose vacation credits. . . ." If the rule is to be applied as you state, in a situation where a department head neglected or refused to grant an employee the vacation to which he was entitled before the expiration of the time referred to, since an employee could not take vacation leave without the consent of the department head, the effect would be to penalize an innocent employee for the default of his department head. Even the possibility of such a construction of the rule indicates a necessity for amendment and clarification of the rules.

It is clear that in the situation you describe in your letter, once the employee in question began service in the position exempted from the rules, since, although continuing in the service of the Commonwealth he was serving in an office which is exempted from the rules, he could not, while the service in the exempt position continued, have been granted any such vacation allowances as are contemplated by the applicable statute and the rules thereunder. In such a situation where the person after his service in the exempt position is to return to a position subject to the vacation rules it would be eminently fair that he should be entitled on his return to the accrued vacation credits he was entitled to at the time he began service in the exempt position, and to such additional credits as he might earn for service in the vacation year in which he returns to the covered position. Further, he should not lose any vacation credits earned by him until the expiration of the vacation year in which he returns to the exempt position, and arrangements should be made for a paid vacation for him at his then current salary in due season to prevent any loss of vacation credits to him.

Vacation Rule LV-20, provides that "A person whose employment by the Commonwealth is uninterrupted shall retain all accrued vacation credits."

As you state in your letter to me, "There is no question that . . . [the

employment of the person as to whom you inquire] . . . was unbroken when he . . . [began service in the exempt position] . . . and that as far as service is concerned it could be said that he has been continuously employed. . . ." He would, therefore, under the provisions of LV-20, quoted above, retain all his accrued vacation credits, unless he can be said to have lost them because of the indirect language of Rule LV-5, quoted above. Since, however, as has been stated, it would have been impossible for the person in question to have been granted any vacation credits while he held the exempt position, forfeiting his accrued rights in the situation would be most unfair, and in my opinion the provisions of LV-20 are to be construed as entitling one whose service with the Commonwealth is uninterrupted to retain, upon his return to a position subject to the vacation rules, the vacation credits he had earned and which had accrued to him and which he had not been granted at the time he left a position subject to the vacation rules and began service in an exempt position.

I would suggest, as I have already done as to the provisions of Rule LV-5, that the provisions of LV-20 also be amended and clarified to expressly negative any implication that employees are to lose vacation credits earned by them and to which they are justly entitled, because department heads refuse to, or cannot legally, grant them within any particular period.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General.*

The Department of Public Works should obtain clarifying legislation before engaging in a rental program of real estate acquired for State highway purposes during the period after the taking and until the property is needed for construction.

MARCH 6, 1962.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have recently requested an opinion as to whether your department can collect rents from the occupants of property taken by eminent domain under c. 79 or purchased under the provisions of the several bond issues for highway purposes. Specifically you have asked whether under the existing statutes your department can:

"1. Collect rent from the former owners of the property for the period of their occupancy after the department obtains title.

"2. Collect rent from present tenants and lessees for the same period.

"3. In case of vacant property, rent or lease to parties who were not occupants or lessees at the time of the taking.

"4. Rent or lease vacant land until needed for construction."

General Laws, c. 79, § 3, specifies the method by which property is acquired by eminent domain and in its pertinent parts now reads as follows:

". . . Upon the recording of an order of taking under this section, title to the fee of the property taken . . . shall vest in the body politic . . . on behalf of which the taking was made; and the right to damages for such taking shall thereupon vest in the persons entitled thereto . . .; provided, however, that when a taking is made for the purpose of a highway . . . ,

title to the fee of the property taken . . . shall not vest in the body politic . . . nor shall the right to damages vest until such way . . . has been entered upon or possession thereof has been taken for the purpose of constructing the same, and if such entry is not made or possession taken within two years of the date of the order, the taking shall be void; . . ."

It is to be noted that where a taking is for highway purposes the title does not vest in the body politic until there has been an entry or possession taken "for the purposes of constructing the same." Prior to 1959 this section of c. 79 provided that the right to damages did not vest until entry was made but the title was vested in the taking authority from the date the order was recorded, apparently subject to being divested if no entry was made in two years. Acts of 1959, c. 626, amended the section to read as set forth above.

It can well be said that the present statute does not contemplate rental or use and occupation charges of property taken for highway purposes prior to construction of the highway. The statute requires that the taking be recorded no earlier than two years from the entry, and the entry must be made for construction; until entry the title is not in the body politic and thus there would be no legal basis for it to charge the occupants rent or use and occupation and an entry made for the purpose of obtaining rental income and not for construction would be illegal. The Accelerated Highway Program under St. 1956, c. 718, as amended by St. 1958, c. 32, and supplemented by St. 1960, c. 528, does not contain any provisions which affect this argument. Acts of 1956, c. 718, § 6, reads in its pertinent parts as follows:

"The department . . . may . . . take by eminent domain under chapter seventy-nine of the General Laws, or acquire by purchase or otherwise, such public or private lands, including buildings thereon . . . as it may deem necessary for carrying out the provisions of this act. . . . No person shall be required to vacate such premises or portion thereof taken by eminent domain under the provisions of this section as used by him as a dwelling place or place of business at the time an order of taking has been made until the expiration of at least four months after date of said order of taking."

The above section merely provides that no eviction shall take place for four months after the *order of taking*. Chapter 79, § 3, contemplates that the order of taking may be made up to two years before construction is to start, and until entry is made or possession taken "for the purpose of constructing (the highway)" title remains in the owner. Indeed, the specific provision that no person is required to vacate for four months, without reference to charges, is basis for an even stronger argument that for at least that period no rent can be charged under any circumstances.

General Laws, c. 81, § 7E, as most recently amended in 1957, gives to the department certain limited rights to lease or rent property taken by it but sets up conditions which preclude rental charges immediately after the taking. If the taking is made for the purposes of § 7C of that chapter (limited access highways) the lease or rental can be made only after the land has been paid for, and in any event the rental or lease can be made only after the property "is *no longer* necessary for highway purposes"; in either case, the consent of the Governor and Council is required. It can well be argued that this specific reference to rental rights excludes the

right to charge rentals in any situation which does not fall precisely within this section. "*Expressio unius est exclusio alterius.*"

On the other hand, if the aforementioned arguments are rejected, it may be said that upon a taking and entry the title vests in the Commonwealth and there is no constitutional or other bar to the Commonwealth making a charge, whether for rent or use and occupation, for the use of the property until it is actually needed for commencement of construction on that part of the highway. Such rental would be only incidental to the public purpose of the taking, namely, highway construction. *Papadinis* v. *Somerville*, 331 Mass. 627, 631, 632. Such an argument, however, leaves almost as many problems as it solves. It does not affect the proposition that St. 1956, c. 718, § 6, quoted above, probably prohibits the charging of rent or use and occupation for the first four months. After the four-month period the question becomes: shall the occupant be treated as a tenant at sufferance or a tenant at will?

In so far as the owners or occupants at the time of the taking are concerned, the taking itself creates a tenancy at sufferance. The department is faced with the choice of continuing or terminating the tenancy created. Whether the occupant is a tenant at sufferance or a tenant at will depends in a large sense upon the agreement, express or implied, of the parties or the conduct of the parties. See *Benton* v. *Williams*, 202 Mass. 189, and *Leavitt* v. *Maykel*, 210 Mass. 55. The distinction between the two tenancies is important as the obligations to a tenant at will far exceed those to a tenant at sufferance.

"A tenant at sufferance has no estate nor title, but only a naked possession, without right and wrongfully, stands in no privity, to the landlord, at common law is not liable for rent, is not entitled to notice to quit, and has no action against his landlord or other person entitled to possession, if himself, his family and goods are ejected without unnecessary force. He differs from a trespasser or disseisor only in that his entry upon the premises is not unlawful. . . . He may leave at any time without notice or liability. No contractual relation (apart from statute) arises out of a possession of such a character."

Benton v. *Williams*, 202 Mass. 189, 192.

"A tenant at sufferance is a bare licensee to whom the landlord owes merely the duty not wantonly nor wilfully to injure him."

Margosian v. *Markarian*, 288 Mass. 197, 199.

General Laws, c. 186, § 3, makes a tenant at sufferance liable for his use and occupancy.

However, once the owner and the tenant at sufferance enter into an agreement to pay a specified rent for a specified period the courts are inclined to hold that a tenancy at will is created. In *Porter* v. *Hubbard*, 134 Mass. 233, at 238, the court held that while a tenancy at sufferance can be converted into a tenancy at will only by contract, such a contract may be inferred from circumstances as well as expressed by formal agreement.

Without going into details as to the duty owed to a tenant at will, it is sufficient to say that the condemnor will be exposed to liability not contemplated by acts authorizing the takings. Renting can be said to be a commercial venture and immunity of the condemnor may not apply. For example, in St. 1956, c. 718, nowhere is found authorization to rent or authority to pay any judgment rendered tort liability, etc., as a result of renting or leasing the premises taken. In this regard it should be noted that a landlord owes to a tenant at will and those claiming under him a duty to

keep common stairways, passages, and areas in the same state of repair as they were at the beginning of the tenancy.

If the former owner becomes a tenant at will and the premises are used for dwelling purposes, then there is an additional problem. A court may well decree that since a tenancy at will was created, the condemnor may not avail itself of c. 79, § 3, to evict the tenant but that c. 239, summary process, so-called, is applicable. In this event the judge can grant the tenants a stay of nine months.

There is the additional problem of local tax assessment. Chapter 59, § 3A, applies to public real estate used for non-public purposes and directs that real estate taxes be assessed against the lessee or occupants in possession. In the recent case of *Atlantic Refining Company* v. *Assessors of Newton*, 342 Mass. 200, where the Atlantic Refining Company leased property from the Commonwealth and operated a restaurant and gas station (a Route 128 taking) thereon, the court held this section applied and Atlantic Refining Company was compelled to pay a real estate tax. In *Atlantic Refining Company* v. *Commonwealth*, 339 Mass. 12, the Atlantic Refining Company recovered from the Commonwealth real estate taxes paid by it on parcels acquired by the Commonwealth in the construction of a limited access way.

It should also be noted that in a petition for assessment of damages, there cannot be set off against the petitioner's claim a counterclaim by the taking authority for the value of the possession and control of the premises after the taking. In *Pegler* v. *Hyde Park*, 176 Mass. 101, at 102, the court said: "The judge rightly ruled that the respondent could not set off against the petitioner's claim for damages the value of his occupation of the property for a time after the taking." See also *Edmands* v. *Boston*, 108 Mass. 535; *Old Colony Railroads* v. *Miller*, 125 Mass. 1; *Imbesheid* v. *Old Colony Railroad*, 171 Mass. 209. Rental or use and occupation income derived from properties by your department would of course have to be paid into the general fund of the Commonwealth in accordance with § 1 of Art. 63 of the Constitution and G. L. c. 29, § 2.

In conclusion, it seems to me that in view of the serious doubts that the Legislature ever contemplated that your department should engage in a rental program and in view of the myriad of other problems which will arise should you do so as an "incidental" activity, it would be wise to obtain clarifying legislation before any of the activities described in your four questions were undertaken.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

A person retired from the public service is entitled to be paid the compensation fixed by statute for a day's service in an office to which he is appointed by the Governor if he waives his pension or retirement allowance for the day.

MARCH 7, 1962.

MR. ANTONIO ENGLAND, *Director, Division of Employment Security.*

DEAR SIR: — You have recently requested an opinion regarding the correctness of payments for attendance at meetings of the Advisory Council of your division to Mrs. Susanne P. Shallna. You state that Mrs. Shallna

retired, presumably from State employment, on July 10, 1959, and subsequently on December 7, 1961, was confirmed as an appointee to the Advisory Council.

General Laws c. 23, § 9N, relating to the Advisory Council, reads as follows in its pertinent parts:

"There shall be in the division (of employment security) . . . a state advisory council of six members . . . to be appointed by the governor, with the advice and consent of the council. . . . Each of the members of the council shall receive the sum of twenty-five dollars as compensation for each day's attendance at meetings of the council; provided, that the total amount paid hereunder to any such member shall not exceed fifteen hundred dollars in any period of twelve months. The council shall meet at least once a month, but not more than sixty times a year."

The aforesaid section also provides that the terms of the appointments shall be for six years.

General Laws, c. 32, § 91, relates to payment by the Commonwealth to persons receiving State pensions and in its pertinent parts reads as follows:

"No person while receiving a pension or retirement allowance from the Commonwealth . . . shall, after the date of his retirement be paid for any service rendered to the Commonwealth. . . . Notwithstanding the foregoing provision of this section . . . a person who, while receiving such a pension or retirement allowance, is appointed for a term of years to a position by the governor with or without the advice and consent of the council . . . shall be paid the compensation attached to the position to which he is appointed or elected; provided, that he files with the treasurer of the governmental unit paying such pension or allowance, a written statement wherein he waives and renounces for himself, his heirs and his legal representatives, his right to receive the same for the period during which such compensation is payable."

The above-quoted portion of G. L. c. 32, § 91, makes it quite clear that a person receiving a pension from the State may be paid compensation for a position to which he was appointed by the Governor only if he waives his right to receive his pension "for the period during which such compensation is payable."

The basic question at issue thus seems to be whether Mrs. Shallna must waive her pension rights for the full term of her appointment to the Advisory Council in order to collect compensation for the days she serves on the Council.

I find it quite significant that the Legislature has used the phrase "for the period during which such compensation is payable" in § 91 rather than a phrase such as "for the term of his appointment" or "so long as he serves in such position," or the like. Literally applied to the instant situation of Mrs. Shallna, since her compensation is on a daily basis, it is my opinion that she is entitled to collect her full compensation for the days she serves on the Advisory Council, within the allowable limits of G. L. c. 23, § 9N, *provided* that on each occasion she files a waiver with the treasurer of the appropriate governmental unit of her pension for the day for which she is so compensated.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

The Board of Registration of Pharmacists is not required to postpone board action against a pharmacist on trial in court for violations of the harmful drug laws pending a disposition of the court case.

March 8, 1962.

Mr. Anthony P. Giuggio, *Secretary, Board of Registration in Pharmacy.*

Dear Sir: — Your letter of recent date relates to the institution of proceedings by your board for violations of the harmful drug laws. In it you request a written opinion relative to clarification of G. L. c. 112, § 27, "hearing on complaints," and inquire as to whether:

"When a registered pharmacist is on trial in court for violations of the harmful drug law, is it necessary for the Board of Registration in Pharmacy to wait for court findings and final disposition of the case by the court before taking action against such individual. . . ."

General Laws c. 112 relates to the registration of certain professions and occupations. General Laws c. 112, §§ 24 to 36, inclusive, include numerous statutory provisions relative to the registration of pharmacists. Sections 61 to 65, inclusive, are general provisions relative to the boards of registration and other boards. Section 61 contains provisions authorizing each board of registration in the Division of Registration of the Department of Civil Service and Registration under the circumstances therein set forth to suspend, revoke or cancel any certificate, registration, license or authority issued by the board. Section 62 deals with the subject of the conduct of hearings for persons against whom charges are filed. Section 63 provides as follows:

"Said board shall not defer action upon any charge before them until the conviction of the person accused, nor shall the pendency of any charge before any of said boards act as a continuance or ground for delay in a criminal action."

Chapter 112, § 27, to which you refer, contains provisions applicable to the Board of Registration in Pharmacy and sets forth in some detail the way and manner in which complaints against pharmacists are initiated, conducted and disposed of. Among other provisions, it is stated in § 27 that, "Such complaint shall set out the offence alleged and be made within sixty days after the date of the act complained of, or within sixty days after a conviction by a court of competent jurisdiction." In accordance with the rules of statutory construction, statutory provisions are to be construed together as a harmonious whole where it is reasonably possible.

Reading §§ 63 and 27 together, I answer your question in the negative. The Board of Registration in Pharmacy is not bound as a matter of law to postpone its hearings and action until the disposition of court proceedings against the person complained of. However, it may exercise a reasonable discretion as to the propriety of proceeding immediately or awaiting the outcome of the court proceedings.

A word of caution: since the enactment of the State Administrative Procedure Act (G. L. c. 30A) State boards are urged to proceed with much care in the initiation, hearing and disposition of charges against those under

their jurisdiction. Accordingly, in proceeding I recommend that your board religiously comply with the provisions not only of G. L. c. 112, § 27, but also §§ 61, 62 and 63 and c. 30A, § 13.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Metropolitan District Commission is not required to obtain a license from the Division of Waterways before constructing the dam across the Mystic River authorized by St. 1957, c. 647.

MARCH 9, 1962.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have requested an opinion as to whether your commission is required to obtain a license from the Division of Waterways prior to proceeding with the construction of the dam across the Mystic River authorized by St. 1957 c. 647.

Said c. 647 does not contain any provisions specifically requiring that the commission obtain the approval of, or any license from, the Division of Waterways.

Section 5 of the act repeals St. 1946, c. 441, and St. 1948, c. 457.

The 1946 statute referred to provided for the preparation of plans for a dam across the Mystic River by the Emergency Public Works Commission, and for the construction of a dam in accordance with such plans by the Metropolitan District Commission, the cost thereof to be met from Federal grants.

The 1948 statute referred to provided for the preparation of plans for a dam across the Mystic River by the Massachusetts Public Building Commission, and for the construction of a dam in accordance with such plans by the Metropolitan District Commission, the cost thereof to be met from Federal grants. By Item 8602–31 of St. 1948, c. 669, § 2, $5,000 was appropriated, to be expended by the Massachusetts Public Building Commission for the preparation of the plans referred to in St. 1948, c. 457.

Both the 1946 and the 1948 statutes referred to specifically provided that "Before undertaking any of the work authorized under said section two and three, the metropolitan district commission shall obtain such permits and approvals as may be required by law from the United States war department and *the state department of public works.*" (Emphasis supplied.) See St. 1946, c. 441, § 5; St. 1948, c. 457, § 5.

In an opinion of the Attorney General to the Department of Public Works, dated May 15, 1925, VII Op. Atty. Gen. 660, holding that G. L. c. 91, § 20, was not applicable to the commission with reference to the construction by it, under authority of St. 1921, c. 497, of the Cottage Farm Bridge, the Attorney General in addition to stating various other reasons for a conclusion that G. L. c. 91, § 20, was there inapplicable to the commission stated, at page 661, "Apart from this, moreover, it seems that section 20, above quoted, would not be held to apply to the Metropolitan

District Commission, a public agency, authorized and directed by statute to do the work in question," citing *Attorney General* v. *City of Cambridge*, 119 Mass. 518. *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 449.

The Metropolitan District Commission has been authorized and directed by specific legislation to construct the dam in question across the Mystic River. There is no provision in the authorizing act (St. 1957, c. 647) requiring the commission to obtain any approval from the State Department of Public Works, although a specific provision for such approval was contained in earlier statutes relating to the construction of the same dam by the commission, which earlier acts are specifically repealed by the 1957 act.

In these circumstances, it is my opinion that the commission is not required, before proceeding with the work, to obtain a license from the Division of Waterways of the State Department of Public Works, in accordance with G. L. c. 91, § 12A, or any other provision of law.

In your request you refer to and quote St. 1957, c. 647, § 3, which reads as follows:

"Notwithstanding the provisions of any special or general law to the contrary, the commission, for the purposes of flood control and the regulation of the water level in the Mystic and Malden rivers above said dam, is hereby authorized to establish and enforce rules and regulations governing said rivers and the use of the waters thereof and tributary thereto consistent with the powers and duties vested in the commission by said chapter ninety-two of the General Laws as to the Charles river and the Charles river basin."

The provisions quoted, while of particular significance in considering the powers of the commission after the construction of the dam as to licensing structures in the waters above the dam (see for comparison the opinion of the Attorney General to the Commissioner of Public Works dated September 10, 1940, Attorney General's Report, 1940, p. 99.), are of lesser significance in connection with the question you raise, which I have answered above, but even in this latter connection the provisions quoted are more consistent with my conclusion than the contrary.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The requirement that the Emergency Finance Board approve land takings, and contracts with the Federal government, by housing authorities under G. L. c. 121, § 26P(b), places full and final responsibility on the Board.

MARCH 19, 1962.

Emergency Finance Board.

GENTLEMEN: — You have recently requested an opinion of the scope of duties and responsibility incumbent upon you as a result of St. 1962, c. 115.

This new act further amends G. L. c. 121, § 26P, by adding a further proviso at the end of the first sentence of the last paragraph of subsection (*b*) of said § 26P, reading as follows:

"and provided, further, that no land shall be taken or acquired under the provisions of this paragraph and no contract shall be entered into with the

federal government without first obtaining the approval of the emergency finance board established under section one of chapter forty-nine of the acts of nineteen hundred and thirty-three."

It should be noted that in addition to the approval of the Emergency Finance Board, a housing authority must have the consent of the State Housing Board and the mayor and the city council or board of selectmen before it may acquire land and enter into a contract with the appropriate Federal agency for the purposes set forth in c. 121, § 26P.

The power of approval has been defined by our Supreme Judicial Court on several occasions. In *Galligan* v. *Leonard*, 204 Mass. 202, at 205 (1910), in dealing with the requirement of a mayor's approval to certain ordinances, it was stated:

"The approval or disapproval of measures passed by the city council implies reflection and study. The collection, classification and investigation of facts may be involved in its intelligent exercise. The consideration of financial ways and means and the application of sound business judgment to the conflicting demands of private interests and public necessity may be required. . . .

"The review of measures passed by the city council is a personal trust reposed in the mayor. . . . It demands individual attention and care."

In *McLean* v. *Mayor of Holyoke*, 216 Mass. 62 (1913), which concerned a requirement that a city contract have the approval of the mayor, it was stated:

"This present case does not present a mere ministerial function into the doing of which no element of sound discretion enters. . . . It goes further and requires the exercise of practical wisdom in the administration of the affairs of the city. . . . Approval implies direct affirmative sanction."

See also similar definitions in the following cases: *Simpson* v. *City of Marlborough*, 236 Mass. 210 (1920); *Leroy* v. *Worcester Street Ry. Co.*, 287 Mass. 1 (1934); *J. S. Rooney, Pet'r.*, 298 Mass. 430 (1937); *Coyne* v. *Alcoholic Beverages Control Comm.*, 312 Mass. 224 (1942); *Herman* v. *Gallagher Electrical Co.*, 334 Mass. 652 (1956).

Perhaps the most pertinent decision to the question you pose is *Brown* v. *Newburyport*, 209 Mass. 259 (1911). It dealt with the validity of a promissory note of the city which was purportedly issued under an ordinance permitting the city to borrow from time to time in anticipation of the taxes of the current year "with the approval of the Committee on Finance." The Supreme Judicial Court said at page 266:

"The finance committee, as its name indicates and the ordinances of the defendant city provided, was the general legislative guardian of the financial affairs of the city. Approval, in this connection, means that the members of the finance committee, acting upon their official responsibilities and having in view the public welfare, shall investigate and sanction according to their own independent judgment, each separate borrowing made under the order. It implies reflection and sound business discretion as to each loan proposed. It did not confer a mere ministerial function. . . ."

In summation, in my opinion, St. 1962, c. 115, has conferred upon your board the full and final responsibility for authorizing the execution by a

housing authority of a land assembly and redevelopment plan or urban renewal plan. You are obliged to investigate and study the plan and apply your wisdom and judgment to the matter in all of its aspects, including financial feasibility, and then to grant or withhold your sanction of the project.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

The State Board of Retirement can properly postpone action on an application filed by an employee of the Commonwealth who resigned while under indictment for alleged offenses connected with his employment.

MARCH 19, 1962.

HON. JOHN T. DRISCOLL, *Chairman, State Board of Retirement.*

DEAR SIR: — In your letter of recent date you state that the State Board of Retirement is in receipt of an application for retirement for reasons of superannuation by a former employee of the Division of Waterways in the Department of Public Works. You further state that the application was filed on December 5, 1961, but does not state the effective date of retirement. You further state that you are aware that the applicant has been indicted by the Grand Jury on several charges in connection with certain projects under the supervision of the Division of Waterways. You further state that you are advised that the applicant submitted a resignation which has been accepted by the Department of Public Works.

After referring to G. L. c. 32, § 10 (2) and § 15 (3), your board requests an opinion "as to whether or not the board can approve the application for the retirement of [the applicant] . . ."

I assume from your letter that the applicant at the time of his resignation had attained the age of fifty-five years and was a member in good standing of the State Employees Retirement System.

The law relating to membership in and retirement from the public retirement systems is largely found in G. L. c. 32. Sections 1 to 32 thereof apply to the contributory retirement systems whereby the employee contributes regularly a portion of his compensation towards a retirement allowance. Generally speaking, with some exceptions, retirement for superannuation is compulsory at the maximum age for the group to which the member belongs. Seventy years is the maximum age for one group, sixty-five for the other. The sixty-five age group usually consists of members whose duties involve hazards, such as firemen and policemen.

Section 5 of c. 32 contains provisions, restrictions and limitations relative to superannuation retirement. In subdivision (2), dealing with the amount of the retirement allowance, is found a chart based largely upon years of service and amount of contribution. The amount of the contribution by the employee in turn depends mostly upon the amount of his compensation. I understand that the applicant at the time of his resignation had been employed for over a quarter of a century by the Commonwealth. Section 5 provides in subdivision (1)(*a*) terms and conditions for retirement. It

provides in part that a member of a retirement system shall "upon his written application . . . be retired for superannuation as of a date which shall be . . . subsequent to but not more than four months after the filing of such application." You advise me that there is no effective date of retirement stated in the application. The date is an integral and important part of the application. *Klepacs* v. *Contributory Retirement Appeal Board*, 340 Mass. 732. However, I assume that the omission may be supplied or a new application filed as the situation develops.

Section 10 of c. 32 relates to the rights of members of the retirement systems who have become separated from the public service either voluntarily or involuntarily prior to reaching the maximum age for their group. Subdivision (1) provides that any member who, after having attained age fifty-five, resigns, or is removed or discharged from his office or position without moral turpitude on his part, shall, upon his written application on a prescribed form filed with the board, receive a superannuation retirement allowance to become effective as provided in subdivision (3) of § 10. Such retirement allowance shall be determined and computed in accordance with the provisions of paragraphs (*a*) (*b*) and (*c*) of subdivision (2) of § 5, and subject to the limitations set forth in paragraphs (*d*) and (*e*), and shall be based upon the member's age and number of years and full months of creditable service on the date the retirement allowance becomes effective.

Without at this time attempting to construe the provisions of G. L. c. 32, § 10, relating to voluntary or involuntary retirement before attainment of the maximum age and other provisions of law which may apply to the matter you refer to, it is sufficient in my opinion to refer to G. L. c. 32, § 15, relating to dereliction of duty by members of retirement systems covered by c. 32, §§ 1 to 28, inclusive. Section 15 contains three paragraphs providing, under the circumstances therein set forth, for the forfeiture or withholding of the retirement allowances.

There appear to be presently pending against the person you refer to two indictments, one in the Superior Court for the County of Suffolk against himself and two others reading as follows:

". . . on the first day of January in the year of our Lord one thousand nine hundred and fifty-nine, and on divers other days and times between that day and the day of the presenting of this indictment, did conspire together to commit, from time to time and on different occasions as opportunity therefor should offer and not at times then particularly set and fixed, the crime of stealing moneys, the property of the Commonwealth of Massachusetts, a free, sovereign and independent body politic."

and the other indictment in the Superior Court in the County of Barnstable reading as follows:

". . . being an executive officer of the Commonwealth of Massachusetts, to wit: a resident engineer employed by the Department of Public Works, Division of Waterways, of the Commonwealth of Massachusetts, did corruptly accept a gift or gratuity, under an agreement or with an understanding that his opinion or judgment would be given in a particular manner upon a matter that was then or would be brought before him in his official capacity."

Naturally, the applicant is presumed to be innocent of the charges made unless and until he has been found guilty. However, in the light of the

foregoing, the applicable provisions of law and the unsettled state of accounts between the applicant and the Commonwealth you may properly decline at this time to grant the application for retirement unless and until the applicant has brought himself within the provisions of law governing the circumstances of this matter.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Only such ordinances or by-laws imposing requirements as to the installation of electrical wiring beyond those imposed by the Board of Fire Prevention Regulations as are not inconsistent with the latter would be valid.

MARCH 21, 1962.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — In your letter of recent date, relative to the Board of State Examiners of Electricians, you pose the following questions:

"Can a city enact an ordinance and a town a by-law imposing requirements beyond those of the Rules and Regulations of the Board of Fire Prevention Regulations made in accordance with the provisions of St. 1950, c. 617?"

Your question poses a problem with which this office is not infrequently confronted. Former Attorney General Paul A. Dever ruled in an opinion found in Attorney General's Report, 1935, p. 31, that:

". . . The long-continued practice of this department and the precedents set by my predecessors in office indicate, what is undoubtedly the correct rule of law, that it is not . . . the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of officials thereunder, except as such interpretations may be necessary to guide them in the performance of some immediate duty. . . ."

Nevertheless, I feel that it may not be inappropriate to consider the law relative to the subject matter you refer to. For nearly three-quarters of a century the General Court, by G. L. c. 166, §§ 30, 31, 32, 33, 34, has reposed in the hands of the inspectors of wires of the various municipalities in the Commonwealth, the inspection of the installation and maintenance of electrical wiring. Section 32 authorizes cities by ordinance and towns by votes or by by-laws to appoint inspectors of wires. Such inspectors shall supervise every wire over or under streets or buildings in their city or town and every wire within a building designed to carry an electric light, heat or power current. The above sections, except for perfecting amendments, remain intact and are presently the law of the Commonwealth.

Acts of 1950, c. 617, inserted a new § 3L in G. L. c. 143. The new § 3L authorizes the Board of Fire Prevention Regulations to make and promulgate and alter, amend and repeal rules and regulations relative to the instal-

lation, repair and maintenance of electrical wiring and electrical fixtures used for light, heat and power purposes in buildings and structures subject to the provisions of sections three to sixty, inclusive of c. 143. The fourth paragraph of § 3L provides that no person shall install for hire any electrical wiring or fixtures subject to the section without first, or within five days after commencing the work, giving notice to the inspector of wires appointed pursuant to the provisions of § 32 of c. 166. Any person failing to give such notice shall be punished by a fine not exceeding twenty dollars.

Section 2 of c. 617 provides that upon the filing with the State Secretary of the rules and regulations referred to in § 3L of c. 143, all by-laws of towns and ordinances of cities relating to the installation, repair and maintenance of electrical wiring and electrical fixtures used for light, heat and power purposes in buildings and structures subject to the provisions of §§ three to sixty, inclusive, of c. 143 shall be annulled. Regulations have been deposited by the Board of Fire Prevention Regulations with the Secretary of State since the enactment of c. 617.

By the provisions of St. 1961, c. 531, the General Court inserted a new § 32A in c. 13 of the General Laws creating a Board of Electricians' Appeals. Acts of 1961, c. 531, also provided for appeals to the Superior Court by persons aggrieved by any order, requirement or direction of an inspector of wires and also for an appeal by any such aggrieved person by a decision or order by the Board of Electricians' Appeals.

From the pattern of the legislation to which I have referred, it would seem that the General Court in 1950, by the enactment of c. 617, intended to retain the ultimate control of the inspection and maintenance of electrical fixtures and wiring in the Commonwealth through the rules and regulations of the Board of Fire Prevention Regulations. At the same time, however, the primary control through the various municipal inspectors of wires in the cities and towns of the Commonwealth has and still remains in them by virtue of the provisions of §§ 30 to 34, inclusive, of c. 166. Section 32 specifically provides in so many words that the inspector of wires "shall see that all laws and regulations relative to wires are strictly enforced. . . ." By the same section the municipalities are authorized to "recover in contract from the owner of any such wire so removed the expense which it has incurred for the removal thereof."

While the matter may not be fully free from doubt, I am not persuaded that the General Court has totally and completely deprived all of the municipalities of the Commonwealth from enacting local legislation in aid of but not interfering in any degree with the laws of the Commonwealth or any lawful regulations properly made. In the case of *Commonwealth* v. *Baronas*, 285 Mass. 321, 323, the Supreme Court said that the mere existence of statutory provisions for some matters within the purview of local legislation will not render the ordinance or by-law invalid as repugnant to law. See *Brown* v. *Carlisle*, 336 Mass. 147, 150. In this case the Supreme Court, in holding to be valid a local by-law prohibiting hunting under certain circumstances, in response to the argument that numerous hunting laws were in effect in this Commonwealth, said:

"The enumeration of these statutes demonstrates that the State has not excluded the type of legislation here undertaken by the defendant town. There is no inconsistency between the statutes and the by-law. . . ."

In the light of the foregoing, I must respectfully decline to answer the question propounded categorically. If a given piece of local legislation interferes with or is inconsistent with the laws of the Commonwealth or any rules and regulations properly made thereunder, the local legislation to that extent, in my opinion, would be invalid. On the other hand, local legislation not inconsistent nor repugnant, but simply aiding in the accomplishment of the objectives of the legislation and in complete harmony therewith may, under given circumstances, be proper and valid.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Board of Registration of Hairdressers may not by rule prohibit the furnishing of free transportation to customers of hairdressing shops.

MARCH 21, 1962.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — You have recently requested my opinion on behalf of the Board of Registration of Hairdressers whether "as a service to patrons, can (hairdresser) shops provide free transportation in a private car?"

You enclosed a copy of the rules promulgated by the Board of Registration of Hairdressers and I note that the following rules by their terms would prohibit the provision of free transportation:

"*Rule 45.* All licensees under this Act, in advertising, shall not use the word 'free' or any other word or words or phrases of similar import or of a character tending to deceive or mislead the public or in the nature of 'bait' advertising.

"*Rule 46.* There shall be no offer of any premium or gift in conjunction with the practice of hairdressing, or the sale of any material which is an accessory to such practice.

"*Rule 51.* . . . No person, including shop, school, hairdresser, operator or manicurist, shall advertise any guarantee, gift promise of a gift or reward for the purpose of inducing hairdressing or manicuring patronage."

I must, however, call your attention to prior opinions of this office to the effect that the Board of Registration of Hairdressers is prohibited by statute (G. L. c. 112, § 87CC) from regulating or fixing compensation or prices or interfering "in any way with the conduct of the business of hairdressing or manicuring except so far as is necessary for the protection of the *public health, safety* or *morals.*" (Emphasis supplied.) Attorney General's Report, 1942, pp. 94–95; Attorney General's Report, 1936, p. 63. I agree with these opinions of my predecessors which have held invalid rules and regulations similar to 45, 46, and 51.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

The Department of Public Works could issue a permit for the removal of, and sell, the materials comprising a high ridge within a State highway layout, the terms of the sale to comply with the rules under G. L. c. 7, § 22(12) as to the disposal of certain property of the Commonwealth.

April 5, 1962.

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

Dear Sir: — You have requested an opinion in regard to the sale by your department of the material comprising a high ridge within the State highway layout on the easterly side of Route 3 in Chelmsford near the relocated River Meadow Brook to the Lowell Industrial Commission. You have in your request indicated your willingness to permit the removal of the ridge and desire to sell the material. The Department of Public Works under G. L. c. 81, § 21, has authority to issue a permit for the removal of material from a State highway. The desirability of the issuance of such a permit is an administrative matter for the determination of the department.

Under G. L. c. 7, § 22(12), the Commission on Administration and Finance has the authority to make rules and regulations governing the disposal of obsolete, excess and unsuitable supplies, salvage and waste material and other property.

Under the newly adopted Uniform Commercial Code, G. L. c. 106, § 2–107, subsection (2), the sale of the material involved here could be defined as a sale of goods. The statute applicable prior to the adoption of the Uniform Commercial Code was G. L. c. 106, § 65. (See Attorney General's Report, 1953, p. 40.) Under said § 65, a severance before the sale, or under the contract, was necessary. Under the present statute G. L. c. 106, § 2–107, subsection (2), a present sale by severance may be effected by the parties making an identification of the property to be sold. This section would not apply if any material harm to the realty would be caused by the severance. If such severance would harm the realty, inasmuch as the severance is to be made by the buyer, subsection (1) of G. L. c. 106, § 2–107, would be applicable and thereunder such a transaction is one that affects land and presents all the problems involving a sale of land, and legislative authority for the sale would be necessary. (See Attorney General's Report, 1953, p. 40.)

In conclusion, your department has authority for the issuance of a permit to remove the material in question from the State highway under G. L. c. 81, § 21. That section must be strictly complied with, and all the requirements thereof relative to the removal of material must be satisfied. The terms and conditions of the sale are to be determined in accordance with the rules and regulations under G. L. c. 7, § 22. As stated above, it must be remembered that in order to properly effect a sale of goods and not of land, the severance of the property in question must be done without material harm to the realty.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By William D. Quigley,
Assistant Attorney General.

During the period after the declaration of an emergency by the Governor and the taking possession of the lines and facilities of the Metropolitan Transit Authority because of an interruption of public transportation by a strike, etc., in violation of an injunction, operation is to be for the account of the Authority and subject to existing applicable legislation.

April 6, 1962.

Hon. Otis M. Whitney, *Metropolitan Transit Authority.*

Dear Sir: — In your recent letter you state that you are the person designated by His Excellency the Governor to take possession of and operate the lines and facilities of the Metropolitan Transit Authority under the provision of St. 1962, c. 307. In view of that fact you request my opinion as to the legal status of the Authority and the duties and obligations of the Authority under c. 307 and the effect that legislation has upon St. 1947, c. 544, as amended.

Acts of 1947, c. 544, is entitled, "AN ACT PROVIDING FOR THE CREATION OF THE METROPOLITAN TRANSIT AUTHORITY AND THE ACQUISITION AND OPERATION BY IT OF THE ENTIRE ASSETS, PROPERTY AND FRANCHISES OF THE BOSTON ELEVATED RAILWAY COMPANY." Chapter 544 contains twenty-eight sections covering in detail the appointment of the public trustees and the operation of the Transit Authority and the facilities and assets thereof. Chapter 544 has been amended somewhat since its enactment. I do not consider it necessary under the present circumstances to go into the amendments in detail. Suffice it for the present to state that the affairs of the Authority shall be managed by a board of trustees appointed by the Governor with the advice and consent of the Council.

As is well known, the Metropolitan Transit Authority has continued its operations in full force down to and including March 31, 1962. On that date St. 1962, c. 307, was enacted by the General Court and approved by His Excellency the Governor. This legislation became immediately effective. It is entitled, "AN ACT GRANTING TO THE GOVERNOR CERTAIN EMERGENCY POWERS RELATIVE TO THE CONTINUED OPERATION OF THE METROPOLITAN TRANSIT AUTHORITY IN THE EVENT OF THE INTERRUPTION OF PUBLIC TRANSPORTATION IN VIOLATION OF AN INJUNCTION."

Section 1 of c. 307 inserts a new § 19A in c. 544 providing in substance that notwithstanding any contrary provisions of law whenever there exists a continued interruption, stoppage, or slowdown of transportation of passengers on any vehicle of the Authority, or a strike causing the same, and which is in violation of an injunction, a temporary injunction, a restraining order, or other order of a court of competent jurisdiction and which threatens the availability of essential services of transportation to such an extent as to endanger the health, safety or welfare of the community, the Governor may declare that an emergency exists. I understand that such a declaration was made. Section 19A further provides that during such emergency the Governor may take *possession* of and operate in whole or in part the lines and facilities of the Authority in order to safeguard the public health, safety and welfare. Such power and authority may be exercised through any department or agency of the Commonwealth or through any person or persons as may be designated by the

Governor. Section 1 goes on to state that "such lines and facilities shall be operated *for the account of the authority.*" The powers granted to the Governor shall expire forty-five days after the proclamation that a state of emergency exists. Section 2 states that c. 307 shall take effect upon its passage.

I am advised that the conditions referred to in the new § 19A came to pass and as I have said the declaration of emergency was made. It remains therefore to construe the provisions of c. 307 in the light of St. 1947, c. 544.

It is a rule of statutory construction that different statutes dealing with the same subject matter shall be construed so far as possible so as to form a harmonious whole. Speaking generally, c. 544 and legislation amendatory thereof shall be construed as in full force and effect except in so far as that may be repugnant to the provisions of c. 307. Chapter 307 contains no repealer provisions whatever. It expires forty-five days after the proclamation of the state of emergency. We will have to assume then that after the expiration of the period all applicable permanent legislation then in force shall continue in full force and vigor.

It is to be noted that under c. 307 the "lines and facilities" of the Authority "shall be operated *for the account of the authority.*" Language such as this, in my opinion, does not pass title but provides for an involuntary agent to assume possession for the continued operation of the Authority for the benefit of the Authority and subject to other existing applicable legislation. *White* v. *National Bank*, 102 U. S. 658.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General.*

Gifts to the Trustees of the Soldiers' Home are made for the use of a State and are deductible for Federal income tax purposes.

APRIL 9, 1962.

MR. JOHN L. QUIGLEY, *Commandant, Soldiers' Home, Chelsea 50, Mass.*

DEAR SIR: — You have recently inquired whether donations received by the Soldiers' Home are tax deductible for Federal income tax purposes.

The Trustees of the Soldiers' Home are granted the same power as trustees of State hospitals, G. L. c. 6, § 41. These powers include the authority to receive gifts of money and real and personal property "in trust for the Commonwealth" which have been made for the use of the hospital, G. L. c. 123, § 127.

Within the limits and on the general conditions therein set forth, the Internal Revenue Code of the United States provides that gifts made for the use of a State are deductible from income, Internal Revenue Code, sec. 2522.

In my opinion, therefore, gifts received by the Trustees of the Soldiers' Home are within the definition of tax deductible gifts contained in the United States Internal Revenue Code.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

Flying the flag of the United Nations on a public building would not constitute a violation of G. L. c. 264, § 8, penalizing such display of the flag of a foreign country.

April 10, 1962.

Mr. Charles J. Kulikowski, *Clerk, District Court of Hampshire Northampton, Mass.*

Dear Sir: — You have requested a construction of the provisions of G. L. c. 264, § 8.

General Laws, c. 264, § 8, provides that "Whoever displays the flag or emblem of a *foreign country* upon the outside of a [public building] shall be punished by a fine of not more than twenty dollars. . . ." (Emphasis supplied.) Then follows an exception which speaks for itself.

The immediate question you pose is whether the display of the flag of the United Nations on public buildings is a violation of § 8. In other words, is the flag of the United Nations the flag of a "foreign country" within the meaning of § 8? In my opinion it is not. I am unaware of any provision in our statutes relating specifically to the flying of the flag of the United Nations. The United Nations is an international organization consisting of the signatory nations to its charter, included among which is the United States of America. It came into being with respect to the United States on October 24, 1945. Its principal objectives are the encouragement of international peace and the development of friendly relations among nations.

General Laws c. 6, § 12N, requires the Governor to annually issue a proclamation calling for the observance of October twenty-fourth as United Nations Day. Exercises appropriate to such day may be observed in the schools of the Commonwealth from and including the seventh grade up to and including the last year of high school.

General Laws c. 40, § 5 (46A), authorizes appropriations for the proper observance of United Nations Day to an amount not exceeding $500 annually. By the provisions of U.S.C.A., Title 36, § 175 (*c*), ". . . No person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof: *Provided*, That nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations." A violation of § 175 (*c*) would not constitute an offense against the laws of the Commonwealth. A violation of § 8 of c. 264 would constitute an offense against the laws of the Commonwealth. However, it is clear to me that the flag of the United Nations is not a flag of a "foreign country" within the meaning of § 8. The United Nations, as I have said, is an international organization dedicated to wiping out wars between peoples and the encouragement of peace and good will by the nations and the peoples thereof.

To answer your question, it is my opinion that the flying of the flag of the United Nations does not constitute an offense under § 8 to which you have referred.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The initial and annual renewal certificates of registration granted to an owner of a motor boat who was born on February 29th, are to expire on the last day of February of the initial and each subsequent applicable year.

APRIL 13, 1962.

MR. WILTON VAUGH, *Director, Division of Motorboats.*

DEAR SIR: — In your letter of recent date you state than an applicant for registration gives February 29 as his birth date and, after calling my attention to G. L. c. 90B, inserted by St. 1960, c. 275, especially § 3(*j*), you pose the following question:

"Does this mean he can have a registration certificate good for three years because his next birthday is February 29, 1964? Or, does it mean that he should be limited to a year after March 1, 1963?"

Section 3(*a*) of c. 90B provides that, subject to the exceptions listed in § 2, the owner of any motorboat principally used in the Commonwealth shall file an application for a number with the director on a form approved by him. The application shall be signed by the owner of the motorboat, and shall be forwarded to the director together with a fee of five dollars for an original certificate of number, or a fee of three dollars for the renewal of such certificate of number.

Subsection (*j*) of § 3 provides that:

"An original certificate of number initially awarded pursuant to this chapter shall be valid for a period *ending one year* from the anniversary of the date of birth of the applicant next succeeding the issuance of such certificate. Each renewal shall be valid for a period *ending one year* from the date of expiration of such certificate so renewed. A certificate of number issued to other than an individual shall expire one year from the date of issuance." (Emphasis supplied.)

It is a rule of statutory construction that if reasonably practicable a statute is to be interpreted in conjunction with other statutes to the end that there may be a harmonious and consistent body of law and that statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both. Moreover, it is the duty of a court to construe the various statutory provisions touching upon a point in issue with due regard to all of them, so as to give a rational and workable effect to the whole. *School Committee of Gloucester* v. *Gloucester*, 324 Mass. 209, 212.

It is obvious from a reading of the provisions to which I have referred that the General Court intended to require a certificate of number annually from the director of the Division of Motorboats for substantially the same reasons that the issuance of certificates of registration of motor vehicles is requested annually.

Subsection (*j*) provides that the initial certificate of number shall be valid for a period ending one year from the anniversary of the date of birth of the applicant next succeeding the issuance of such certificate. It further provides that each renewal shall be valid for a period ending one year from the expiration of the certificate so renewed.

In my opinion, the provisions you have referred to require that the certificates of applicants having birthdays on the last day of the month of February of any given year should be handled on the same basis, whether the last day of February comes on February 28 or falls upon February 29 in leap year. To hold that the certificates of number of applicants born on February 29 should run in each case until the following leap year would completely frustrate the obvious intent of the General Court. Such a construction is not to be indulged in unless required and I do not feel that such a construction is required.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

An application filed with the State Racing Commission by the Nantucket Agricultural Society, Inc., for a license to conduct a racing meeting in connection with an exhibition for extension or encouragement of agriculture held not in proper form.

APRIL 17, 1962.

LAWRENCE J. LANE, *Secretary, State Racing Commission.*

DEAR SIR: — You have recently requested an opinion as to whether or not an application for a license to conduct a racing meeting in connection with an exhibition for extension or encouragement of agriculture filed with your commission by the Nantucket Agricultural Society, Inc., is in proper form. With your request you sent me a copy of the application and a copy of a "Memorandum" attached thereto which reads as follows:

"Since no provision has been made by the Legislature for Fairs that have operated prior to Chapter 128A of the General Laws of the Commonwealth of Massachusetts inserted by St. 1934, c. 374, as amended, the Nantucket Agricultural Society, Inc. respectfully contends that G. L. c. 128A is not applicable; that in the "APPLICATION FOR LICENSE TO HOLD OR CONDUCT A RACING MEETING AT REDUCED LICENSE FEE PROVIDED FOR IN SECTION 4, CHAPTER 128A OF THE GENERAL LAWS" questions 19, 21, 22, and 23 are not applicable as no other form of application is made available by the State Racing Commission for a license to conduct a racing meeting in conjunction with a Fair."

Questions on the application referred to in the "Memorandum" are as follows:

"19. Has the applicant been licensed during the past five years to conduct racing meetings under the reduced license fee as provided by G. L. c. 128A, § 4?

"21. Has the Department of Agriculture of the Commonwealth of Massachusetts granted money for premiums to the applicant during the past five years?

"22. Has the applicant paid any amount for premiums above the amount granted by the Department of Agriculture for premiums during the past five years?

"23. Has the applicant disbursed amounts of money from the earnings of the applicant in the interest of agriculture during the past five years?"

The Nantucket Agricultural Society, Inc., answered questions 19 and 21, "No* see attached Memorandum." Questions 19 and 21 refer to the requirements of § 3 of c. 128A which read as follows:

". . . and provided, further, that on an application for a license to conduct a horse or dog racing meeting in connection with a state or county fair by an applicant which has not operated a horse or dog racing meeting under the provisions of this chapter prior to July first, nineteen hundred and fifty-eight, the applicant shall show (1) that the state or county fair at which such racing meeting is to be held has operated for a period of at least five consecutive years; (2) that said fair has received financial assistance from the agricultural purpose fund for the same period of time; and (3) a certificate from the commissioner of agriculture that said fair is properly qualified and approved by him. . . ."

It should be noted that the application in question was not accompanied by an approval of the "fair" by the Commissioner of Agriculture. Also you state in your letter that the applicant has never previously operated a horse or dog racing meeting although I am aware from previous correspondence regarding the applicant that it operated an agricultural fair from 1928 to 1934.

The "Memorandum" of applicant erroneously assumes that the special requirements set forth in § 3 of G. L. c. 128A concerning racing meetings in connection with county fairs does not apply to fairs which have operated prior to the adoption of that chapter. A reading of the applicable portion of § 3 quoted above discloses that mere operation of a fair is not sufficient and neither the application, your letter, nor any knowledge of my own discloses that this applicant ever operated a horse or dog racing meeting in connection with its fairs, whether under c. 128A or otherwise.

Therefore, it is my opinion that the application for a license to conduct a racing meeting dated March 29, 1962, filed by the Nantucket Agricultural Society, Inc., is not in proper form in accordance with the provisions of § 3 of G. L. c. 128A. This opinion is wholly consistent with my opinion dated April 20, 1961, relating to an application by the same applicant filed last year.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

Property rights, and rights to fill, of the City of New Bedford, as to certain lands in the tide waters of the Acushnet River, under statutory grants to its predecessors in title, St. 1957, c. 762, establishing the Harbor Development Commission of the city of New Bedford, and G. L. c. 91, §§ 1, 2 and 11.

April 23, 1962.

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

Dear Sir: — I am in receipt of your recent letter in which you ask certain questions relative to the adoption by the Division of Waterways of the Department of Public Works of a proposed "project for which petition was brought by the City of New Bedford, involving construction of certain facilities in tidewater."

Your first question asks whether "the City of New Bedford as successor in title to abutting land owners on the Acushnet River owns to the Harbor or Channel line of said River with a right to fill said land."

Chapter 18 of the Acts of 1806 authorized "owners of lots of land adjoining on Acushnet River, in the town of New Bedford, in the county of Bristol, from Clark's Point, so called, to the head of navigation in said river, to build and extend wharves below low water mark in said river." Section 1 authorized "said wharves to extend to the channel of said river; . . ." Section 2, however, reserved to the General Court the right "to make such provisions respecting the navigation of said river . . . as they may think the public interest requires."

In construing said St. 1806, c. 18, the court, in *Haskell* v. *New Bedford,* 108 Mass. 208, 216, stated that the riparian owner's "title extended, by virtue of the St. of 1806, c. 18, to the channel of the river." In *Hamlin* v. *Pairpoint Manufacturing Co.,* 141 Mass. 51, 57, the court stated that the act ". . . operated as a legislative grant to the owners of lots of an interest in the soil between their lots and the channel of the river . . . The act certainly gave them a possessory title for the purpose of building wharves . . ." And in *Hastings* v. *Grimshaw,* 153 Mass. 497, the court referring to the right decided in the *Hamlin* case to have been granted to the riparian owner by St. 1806, c. 18, said at page 501, "This was an additional right of property outside of the former land of each of the riparian proprietors, created by the statute in favor of those who then owned the lots. It was a title to the adjacent land, and to the water over it, subject to certain rights in the public."

That such a grant is an exception to the general rule in Massachusetts is obvious from the cases. Save for statutes such as the 1806 act, proprietors of adjoining uplands own only the land between high and low water mark which does not extend more than 100 rods from the high water mark, and that ownership is with a reservation of certain rights in the public. *Colonial Ordinance* 1641–1647; *Commonwealth* v. *Boston Terminal Co.,* 185 Mass. 281, 283. Beyond this line of private ownership as established by Colonial Ordinance, "The waters and the land under them . . . are held by the State, both as owner of the fee and as the responsitory of sovereign power, with a perfect right of control in the interest of the public." *Michaelson* v. *Silver Beach Improvement Assoc., Inc.,* 1961 A.S. 453, 455. That the sovereign can, by way of grant, divest itself of its interest by an act of the Legislature in lands that are below extreme low water mark is not disputed. *Commonwealth* v. *Boston Terminal Co.,* 185 Mass. 281, 283–284. This the sovereign did by St. 1806, c. 18.

As a successor in title the City of New Bedford has the rights of those who were the abutting landowners at the time of the enactment of St. 1806, c. 18, save as the Legislature may have limited or restricted such owners' rights at a time subsequent to 1806.

As was stated earlier, § 2 of the act reserved to the General Court the right "to make such provisions respecting the navigation of said river . . ." In 1848 the Legislature established "lines of the channels of the harbors of New Bedford . . . beyond which no wharf or pier shall hereafter be extended into and over the tide-water of the Commonwealth." Chapter 269, § 1. That act further states in § 7 that "No wharf, pier, building, or incumbrance of any kind, shall hereafter be extended beyond the said lines, or either of them, into or over the tide-water in said harbors; nor shall any wharf or pier, which is now erected on the inner side of either of said lines, be extended further towards the said line than such wharf or pier now stands, or than the same might have been lawfully enlarged or extended before the passing of this act, without leave being first obtained from the legislature."

That such an act is a valid and constitutional limitation or restriction of an owner's use of his land has been established in this Commonwealth. This is particularly so where as here, the act which made the grant, itself reserves this right. See *Commonwealth* v. *Alger*, 61 (7 Cush.) 53, 104. Before the act of 1848, and by virtue of the Act of 1806, such owners could "erect, continue and maintain wharves . . . (and provide docks extending) to the channel of said river . . ." as said channel then eixsted, so long as no obstruction of navigation resulted thereby. The right conferred by the 1806 act appears to have included the right to fill. See dictum in *Commonwealth* v. *Boston Terminal Co.*, 185 Mass. 281, 284. See also *Fitchburg R.R. Co.* v. *Boston & Maine R.R.*, 57 (3 Cush.) 58, 87.

I assume that the extent of the contemplated work lies within both the channel line as it existed in 1806 and that established in 1848. If it does not involve a seaward extension of any pier or wharf existing on the effective date of St. 1848, c. 269, clearly the latter statute and the 1806 statute are sufficient authority for the city of New Bedford to undertake the project without additional permission of the Legislature. If the contemplated work does involve such a seaward extension, it would appear that leave of the Legislature would be necessary. The question then presents itself as to whether that permission has been granted.

As noted above, it was held in *Hastings* v. *Grimshaw*, 153 Mass. 497, 501 (1891), decided long after the effective date of St. 1848, c. 269, that the right granted to the abutting owners by St. 1806, c. 18, was ". . . a *title* to the adjacent land, and to the water over it, subject to certain rights in the public." (Emphasis supplied.)

Chapter 762 of the Acts of 1957 which established the Harbor Development Commission of the city of New Bedford empowered the commission in § 2 thereof to make all necessary plans, for the development of the New Bedford Waterfront in certain areas defined in § 3, which areas, I assume, encompass the area where the proposed work is to be performed. Said § 3 specifically authorizes the commission to use "all tidal waters or other waterfront properties now *owned* by the city of New Bedford." (Emphasis supplied.) Section 4 thereof authorizes the "constructing, or securing the construction or utilization of, public piers and the necessary utilities in connection therewith, including the planning, design and development of

sites for warehouses and commercial and industrial establishments, as in the opinion of the commission may be necessary and desirable for such purposes."

Inasmuch as said St. 1957, c. 762, authorizes the commission to use all tidal properties owned by the city, and inasmuch as the city of New Bedford is successor in title to riparian owners whose "title" as stated in the *Hastings* case, "extended, by virtue of the St. of 1806, c. 18, to the channel of the river," it appears that should the contemplated work involve a seaward extension, the 1957 act grants to the city of New Bedford, acting through its Harbor Development Commission, permission to extend seaward as required by St. 1848, c. 269, § 7.

Since 1866, the Legislature has prescribed a series of enactments establishing control of its tidelands and tidewaters in a Board of Harbor Commissioners and providing for supervision and licensing of fill and construction in tidewaters. See St. 1866, c. 149; St. 1869, c. 432; St. 1872, c. 236; St. 1874, c. 284. Many of these provisions are now incorporated in G. L. c. 91. The Department of Public Works has succeeded to the powers and duties of the Board of Harbor Commissioners (G. L. c. 91, §§ 1, 2) and its functions are administered through its Division of Waterways. By complying with the requirements of c. 91, the city of New Bedford may itself undertake projects for filling in their tidelands under their grant of 1806 within the limits imposed by the Act of 1848 and under the permission granted by the Act of 1957.

Your attention is also directed to c. 91, § 11, authorizing the Department of Public Works to undertake certain projects described therein on a contributing basis with local communities. In this regard see the opinion of the Attorney General to the Division of Waterways, dated May 10, 1961.

Your request refers to a case which you state "involved a location in Fairhaven." This would not be in point because the 1806 statute specifically applies to land along the Acushnet River located in New Bedford.

In view of the opinion expressed above in answer to your first question, it becomes apparent that the two remaining questions which you propounded are inapplicable, as they refer to problems which would arise if the city did not have rights to fill under the 1806 Act.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General.*

In the absence of a statute requiring that full time in office hours be devoted to the duties of his office the Registrar of Motor Vehicles is subject to the general rule applicable to public officers that the holding of an office fixes the right to receive the salary thereof.

APRIL 25, 1962.

CALVIN P. BARTLETT, ESQ., *Special Senate Committee to Investigate the Administration of the Registry of Motor Vehicles.*

DEAR SIR: — In accordance with a vote of the Special Senate Committee of which you are the counsel directing you to do so, you have requested the opinion of the Attorney General as to whether or not the position of Registrar of Motor Vehicles is a full-time job.

The position of Registrar of Motor Vehicles is established by G. L. c. 16, § 5, and the salary for the position is specifically set in said § 5 at $12,500, and is not fixed in accordance with the provisions of G. L. c. 30, §§ 45 to 50, inclusive. The provision of G. L. c. 30, § 46 (10), that rates of compensation in the salary schedule contained in said § 46 are for work hours as provided in G. L. c. 149, § 30A, therefore, has no application to the position of Registrar.

It is clear that the position of Registrar of Motor Vehicles is a public office. *Attorney General* v. *Drohan*, 169 Mass. 534.

Traditionally, except as specific provision has been made by the Legislature to the contrary, the incumbent of a public office has not been required to conform to regularly scheduled work hours for public employees.

In *Eisenstadt* v. *County of Suffolk*, 331 Mass. 570, 574, our Supreme Judicial Court stated as to the salary fixed for a public office:

"Such salary is a 'fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered . . . [and is] payable in sickness as well as in health.' *Benedict* v. *United States*, 176 U. S. 357, 360. Its payment *depends upon the holding of the title to the office rather than upon the amount of labor performed. . . .*" (Emphasis supplied.)

In recent years the Legislature has inserted in various statutory provisions establishing offices or positions, and specifically fixing the salaries therefor, requirements relating to the time to be devoted by the incumbent to the duties of the position. In some instances the requirement is that "full time," in others that the "whole time in business hours," be devoted to the duties of the office or position.

General Laws c. 16, establishing the Department of Public Works and setting up various subdivisions including the Registry of Motor Vehicles therein, contains, in § 4, a specific provision that the commissioner and associate commissioners of the department shall devote their whole time in office hours to the work of the department, and in § 5A, a specific provision requiring that the director of the Division of Waterways in the department shall devote his entire time to the work of the division.

Except, however, as a specific provision has been made by the Legislature, the general rule as to the right of a public officer to the salary fixed for his position is that stated above in the quotation from *Eisenstadt* v. *County of Suffolk*, 331 Mass. 570.

I construe the question on which the committee has asked for an opinion, *i.e.* whether the position of Registrar of Motor Vehicles is "a full-time job," as meaning is the incumbent to be deemed to be subject to a requirement that he devote his full time in business hours to the duties of his position?

In view of the general rule referred to above and the fact that G. L. c. 16, § 5, establishing the position and fixing its salary contains no provision excepting the office of Registrar of Motor Vehicles from the general rule, the answer to the committee's question is that no such requirement is applicable.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

Persons employed by the University of Massachusetts on a part-time or intermittent basis, paid from "03" account funds, who operate state-owned motor vehicles are "employees" within the provisions of G. L .c. 12, § 3B, relative to the defense of actions arising out of such operation.

May 1, 1962.

Mr. Kenneth W. Johnson, *Treasurer, University of Massachusetts.*

Dear Sir: — You have recently requested an opinion as to whether students and others employed by the University on a part-time or intermittent basis and whose wages are paid from funds under subsidiary account -03 "Services — Non-Employees" are within the definition of "employee" as used in § 3B of G. L. c. 12.

The pertinent part of said § 3B reads as follows:

"Upon the filing with the attorney general of a written request of any officer or employee of the Commonwealth or of the metropolitan district commission that the attorney general defend him against an action for damages for bodily injuries, including death at any time resulting therefrom, or for damage to property, arising out of the operation of a motor or other vehicle owned by the Commonwealth, including one under the control of said commission, wherein such officer or employee consents to be bound by any decision that the attorney general may make in connection with the trial or settlement of such action, the attorney general shall, if after investigation it appears to him that such officer or employee was at the time the cause of action arose acting within the scope of his official duties or employment, or was especially assigned by his superior to operate such motor vehicle and certification of such special assignment is made by his superior and the head of the department or institution to which state-owned vehicle is assigned, take over the management and defense of such action. The attorney general may adjust or settle any such action, at any time before, during or after trial, if he finds after investigation that the plaintiff is entitled to damages from such officer or employee, and in such case there shall be paid from the State treasury for settlement in full of such action from such appropriation as may be made by the general court for the purposes of this section such sum, not exceeding ten thousand dollars on account of injury to or death of one person, and not exceeding five thousand dollars on account of damage to property, as the attorney general shall determine to be just and reasonable and as the governor and council shall approve."

In your letter you state:

"These individuals perform services subject to the will and control of their supervisor, both as to what shall be done and how it shall be done. We have the right to discharge such individuals and we furnish any tools required and a place to work. We consider their wages to te taxable and, therefore, report their earnings for income tax purposes."

In my opinion, individuals, whether students or otherwise, who are employed by the University on a part-time or intermittent basis and who in the course of such employment operate motor vehicles are "employees"

as such term is used in § 3B of G. L. c. 12 and are entitled to the protection therein, provided all the other conditions of that section are met in any given instance.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LAWRENCE E. COOKE,
Assistant Attorney General.

The New Bedford Institute of Technology Research Foundation has no authority to borrow money against a contract with the United States for a study to be made by the Foundation.

MAY 1, 1962.

DR. JOHN E. FOSTER, *President, New Bedford Institute of Technology.*

DEAR SIR: — Your letter of recent date states that the New Bedford Institute of Technology Research Foundation is about to enter into a contract with the United States of America for a study of the Massachusetts flounder and scallop industry. The contract carries a maximum liability of $90,000.

You further state that it will be necessary for the Foundation to borrow to the extent of $20,000 to cover the cost of the first quarter. Inasmuch as the Foundation is to be reimbursed on a quarterly basis, I understand that your purpose is to assign or pledge the contract as security for the loan of $20,000. In the light of these facts you request an opinion as to the legality of borrowing money against the contract under the legislation, G. L. c. 74, § 46B, by which the Foundation is established.

Much attention has been given in the Constitution of Massachusetts to the subject of borrowing by the Commonwealth and pledging the credit of the sovereign. Article LXII has four sections circumscribing the borrowing of money. Section 3 of Art. LXII specifically provides in some instances for a two-thirds vote by yeas and nays for loans. Article LXIII contains careful restrictions controlling the collection of revenue and appropriations by the Commonwealth. The underlying purpose, it has been said, of this amendment relating to the budget is to centralize the financial affairs in the State treasury and place the supervision and control of the expenditure of State funds in the Legislature through the medium of a budgetary system. *Baker* v. *Commonwealth,* 312 Mass. 490; *Opinion of the Justices,* 297 Mass. 577.

Without at this time ruling on the exact status of the Research Foundation of the New Bedford Institute of Technology, it is hard to believe that the fundamental fiscal policies set forth in the Constitution regulating the affairs of the sovereign should be lightly set aside and overlooked in the administration of the financial affairs of the various subordinate entities carrying on for the Commonwealth its various activities.

In my opinion it would require strong, clear and precise language to construe the authority granted in G. L. c. 74, § 46B, to include the right to

borrow and pledge or assign the assets of the funds as collateral for a loan in the manner contemplated. I find no specific language to that effect. If the Foundation can borrow and pledge its assets as collateral for a comparatively small loan, I see no reason why it may not do the same for a large loan.

Even in private transactions our court has held that individual trustees having express power to sell the assets of the trust may not mortgage them. *Sanger* v. *Farnham*, 220 Mass. 34. Nor does a trustee ordinarily have the power to borrow and pledge as security for a loan. *Loring* v. *Brodie*, 134 Mass. 453, 459; *Tuttle* v. *First National Bank of Greenfield*, 187 Mass. 533. The rule established by the above cases will be, I believe, more strictly applied in the case of loans by public entities.

While I have no doubt that the enterprise you refer to would be a useful and proper one, in the light of the foregoing I am constrained to answer your query in the negative.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

BY FRED W. FISHER,
Assistant Attorney General.

The Board of Registration of Real Estate Brokers and Salesmen may suspend or revoke a license if the licensee has been convicted of criminal offenses referred to in G. L. c. 112, § 87AAA.

MAY 2, 1962.

MR. JOHN J. EGAN, *Executive Secretary, Board of Registration of Real Estate Brokers and Salesmen.*

DEAR SIR: — You have recently requested an opinion whether or not your board can suspend or revoke the license of a licensee who has been found guilty "of any criminal action."

In my opinion the answer to your question is set forth with precision in that paragraph of § 87AAA of G. L. c. 112, which reads as follows:

"The board may also suspend, revoke or refuse to renew any license when it has found that the licensee has been convicted of a criminal offence by a court of competent jurisdiction of this or any other State which demonstrates his lack of good moral character to act as a broker or salesman as the case may be."

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

BY LAWRENCE E. COOKE,
Assistant Attorney General.

The Department of Public Utilities may exempt the Metropolitan Transit Authority as a "public service corporation" from zoning regulations, as provided in G. L. c. 40A, § 10, but may not exempt a trucking company as such a corporation.

May 7, 1962.

Hon. Roy C. Papalia, *Chairman, Department of Public Utilities.*

Dear Sir: — In your recent letter you refer to a petition of the Metropolitan Transit Authority for exemption from the operation of zoning ordinances or by-laws referred to in G. L. c. 40A, § 10.

You request an opinion upon two questions: (1) Whether the Metropolitan Transit Authority is a "public service corporation" within the meaning of § 10 which may have the benefit of an exemption by vote of the Department of Public Utilities; and (2) whether a "trucking company" which operates under Department of Public Utilities and Interstate Commerce Commission regulations may file a petition for exemption from the operation of the zoning regulations in the town of Norwood.

I answer question (1) as follows: The Metropolitan Transit Authority is described in St. 1947, c. 544, § 1, as being ". . . a body politic and corporate. . . ."

In the very recent decision of the Supreme Judicial Court in the case of *Hansen, et als.* v. *Commonwealth*, 1962 Adv. Sheets, page 637, it is described as a "public body." The court, referring to the opinion in the case of *New York City Transit Authority* v. *Loos*, 2 Misc. 2d (N. Y.) 733, 738, affirmed in 3 App. Div. 2d (N. Y.) 740 (without opinion), cited with approval the following language:

"Whatever may be the case elsewhere, and under other conditions, whatever may have been the case in other times, here and now, and for this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare."

I answer in the affirmative question (1).

I answer question (2) as follows, and in doing so I assume that the "trucking company" you refer to is a corporation: G. L. c. 40A, § 10, provides in substance that a building or land to be used by a public service corporation may be exempted from the operation of a zoning ordinance or by-law if, upon petition by the corporation, the Department of Public Utilities shall, after public notice and hearing, decide that the building or land in question is "reasonably necessary for the convenience or welfare of the public." The issue involved in this question is whether a "trucking company" is a "public service corporation" within the purview of c. 40A, § 10.

I assume that the trucking corporation you refer to is a carrier of property by motor vehicle under the jurisdiction of your department by virtue of the provisions of G. L. c. 159B. I am not aware that the question you pose has been adjudicated by our court. In an opinion rendered by my predecessor, Attorney General's Report, 1956, p. 53, it was ruled that the owner of a single dump truck who was carrying property for hire for the

Massachusetts Turnpike Authority was not exempted from the requirements of G. L. c. 159B by virtue of the provisions of § 13 thereof. However, the point resolved in the opinion was that the Massachusetts Turnpike Authority was not a "political subdivision" and the truck owner working for it was not, therefore, transporting property for a "political subdivision" of the Commonwealth and so exempt from the provisions of c. 159B.

In the case of *Attorney General* v. *Haverhill Gas Light Company*, 215 Mass. 394, the Supreme Court ruled that a corporation which had been engaged in the business of manufacturing and selling gas for light and heat might not sell its physical property without special authority from the Legislature. In its opinion, the court quoted with approval the following language in an earlier opinion:

" 'The respondent is a corporation, organized to exercise a public franchise of importance to the community in which it conducts its business.

It is its duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them. *It cannot relieve itself from this duty so long as it retains its charter* . . . Without legislative authority it cannot sell its property and franchise to another party, in such a way as to take away its power to perform its public duties. . . .' " (Emphasis supplied.) The court further stated that "The Legislature clearly has granted no consent to the transfer but has prohibited it. . . ."

In the case of *Town of Wenham* v. *Department of Public Utilities*, 333 Mass. 15, which was a petition by way of appeal under G. L. c. 25, § 5, from an order of the Department of Public Utilities made under G. L. c. 40A, § 10, exempting from the operation of a zoning by-law of the town a parcel of land in a residence district for the purpose of a gate house to be erected by the Haverhill Gas Company, the court, in affirming the decision of the Department, said:

"There can be no doubt that the Haverhill Gas Company is 'a public service corporation,' and therefore entitled to petition the department for exemption from the zoning ordinance under c. 40A, § 10, even if it had no power of eminent domain and had to buy its land as best it could. It was in substance held to be a public service company in *Attorney General* v. *Haverhill Gas Light Co.*, 215 Mass. 394 . . ."

Your letter does not disclose whether the "trucking company" in question has in its charter any right of eminent domain. I assume that it does not. It may be doubtful if trucking companies generally do have the right of eminent domain. It would seem probable that many owners of trucks coming within the purview of G. L. c. 159B regulating "carriers of property by motor vehicle" are not incorporated but simply private individuals or perhaps partnerships. I am unaware of any provision of law requiring the owners of motor trucks under the jurisdiction of c. 159B to obtain a special act of the General Court in order to effectuate a sale of their assets.

Section 3C of c. 159B would indicate that if the carrier failed to render services in accordance with its certificate, a forfeiture of its certificate might be effected.

A reading of the opinions I have referred to and an examination of the

provisions of c. 159B relative to carriers of property by motor vehicle, of which I assume the "trucking company" you refer to is one, lead me to the conclusion that the "trucking company" while it may well be a common carrier, is not a "public service corporation" within the purview of G. L. c. 40A, § 10.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A rule of the Board of Fire Prevention Regulations requiring parapets around certain inner courts and skylights is valid.

MAY 15, 1962.

MR. SAMUEL GRONICH, *Chairman, Board of Fire Prevention Regulations, Department of Public Safety.*

DEAR SIR: — You have recently requested an opinion regarding the validity of Rule 18 of your board's rules and regulations, a copy of which you enclosed, which are captioned:

"The Commonwealth of Massachusetts
Department of Public Safety
Board of Fire Prevention Regulations

Made in accordance with the provisions of Chapter 148, Section 10, G. L. (Ter. Ed. as amended)

RULES AND REGULATIONS FOR THE PURPOSE OF REMEDYING ANY CONDITION FOUND TO EXIST IN OR ABOUT ANY BUILDING OR OTHER PREMISES OR ON ANY SHIP OR VESSEL IN RESPECT TO FIRES, THE PREVENTION OF FIRE AND FIRE HAZARDS.

FPR-9
OCTOBER 26, 1960"

You state that recently in a district court a complaint based on Rule 18 of said regulations was dismissed on the grounds that this rule was beyond the power of your board. Specifically you ask:

"1. Is Rule 18 of FPR-9 in compliance with G. L. c. 148, § 28K?

"2. Should the statutory authority cited be § 10 or § 28 or both?"

According to your letter, the argument which persuaded the district court to dismiss the complaint was that Rule 18 has nothing to do with fire prevention; it is a rule to protect fire fighters, and your board has no authority to pass such a regulation.

Rule 18 reads as follows:

"Any inner court not protected by a roof which will support a load of 40 lbs. per square foot shall have a substantial parapet or barrier at least

30 inches high. A skylight shall be constructed to support 40 lbs. per square foot or shall have a substantial parapet or barrier at least 30 inches high."

In my opinion, promulgation of said Rule 18 is within the express powers granted to your board by G. L. c. 148, § 10 and § 28. Said § 10 reads in part as follows:

"The board of fire prevention regulations shall make, and from time to time may alter, amend and repeal, rules and regulations relative to fire prevention *which said board is authorized or required under any provision of this chapter to adopt or make. . . .*" (Emphasis supplied.)

Section 28 sets forth a *requirement* that your board issue rules and regulations limited to, among other items —

"K. Requiring proper safeguards to be placed and maintained about or over roof skylights and about outer or inner courts or shafts at the roof line."

Obviously, Rule 18 is authorized by the specific provisions of § 28K and I believe that such provision of safeguards for firefighters may certainly be described as a fire prevention device.

Thus I would answer your first question in the affirmative.

In regard to your second question, I believe that the caption page of the rules and regulations in question should refer to § 28 of G. L. c. 148, as well as § 10, although failure to do so does not affect the validity of the rules and regulations.

Sutherland, *Statutory Construction*, Vol. 2, sec. 4903. *United States* v. *McKnight*, 253 F(2) 817 (C.A. N. Y., 1958).

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By LAWRENCE E. COOKE,
Assistant Attorney General.

A high school driver education teacher paid from public funds is not required to obtain an instructor's permit from the Registrar of Motor Vehicles.

MAY 24, 1962.

MR. CLEMENT A. RILEY, *Registrar of Motor Vehicles.*

DEAR SIR: — You have recently requested an opinion as to whether a high school driver education teacher who is paid from the town treasury for his work is required to obtain from you an instructor's permit under § 32G of G. L. c. 90.

You state that a difference of opinion between you and the Commissioner

of Education exists on this matter arising out of your interpretation of an opinion of mine contained in a letter to you dated August 25, 1959.

My opinion of August 25, 1959, held that driving instructors operating within the University Extension program who charged students for instruction were required to obtain permits under § 32G of G. L. c. 90. I specifically declined to render any opinion at that time on the then hypothetical situation where the student paid the fee to the University Extension and the instructors were compensated by the Commonwealth.

General Laws, c. 90, § 32G, states: "No person shall engage in the business . . . of giving instruction for hire in driving motor vehicles without being licensed for such purpose by the registrar." and "No person shall be employed by a licensee as a driving instructor, nor shall any person give instructions for hire in the operation of motor vehicles unless such person is the holder of an operator's license and an instructor's certificate issued by the registrar." It is obvious, therefore, that the statute is directed to commercial enterprises. Also, it should be noted that as a general rule the word "person" in a statute is not construed to include the Commonwealth or a political subdivision thereof. *Hansen* v. *Commonwealth*, 1962 A. S. 637, 642.

Therefore, in my opinion, a high school teacher who as part of his duties for which he is paid by a city or town gives driving instruction and driver education courses to the students, is not required to be licensed by you under § 32G of G. L. c. 90.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Lawrence E. Cooke,
Assistant Attorney General.

The Massachusetts Aeronautics Commission is entitled to be furnished with suitable offices at the Logan Airport without charge by the Massachusetts Port Authority.

May 29, 1962.

Mr. Crocker Snow, *Director, Massachusetts Aeronautics Commission.*

Dear Sir: — You have requested an opinion regarding the effect of the following provision in G. L. c. 6, § 57:

"The commission shall be provided with suitable offices at the General Edward Lawrence Logan Airport and elsewhere within the Commonwealth as the commission may determine."

Also you ask whether or not your commission should be charged rent for such office space as may be provided.

In my opinion, the clear wording of the above provision is a direction to any other State authority, commission, or agency having control over

the Logan Airport to furnish your commission with office space at that location. In the case of *McQuade* v. *New York Central R.R.*, 320 Mass. 35, our Supreme Judicial Court held that a statute which read "Every railroad corporation shall *provide* a uniform hat or cap (for certain employees). . ." required the railroad to furnish such hat or cap *without charge*. See also *Ware* v. *Gay*, 11 Pick. 106. Therefore, it is also my opinion that the Legislature did not intend that your commission should be charged rent for the office space supplied you pursuant to G. L. c. 6, § 57.

Since the Massachusetts Port Authority which now has the possession, title and control over the Logan Airport is a body politic and a public instrumentality of the Commonwealth, the direction contained in G. L. c. 6, § 57, relative to providing your commission office space at Logan Airport applies to it. G. L. c. 91, app. sections 1–1, 1–2, 1–5.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

BY LAWRENCE E. COOKE,
Assistant Attorney General.

The furnishing by the Massachusetts Rehabilitation Commission of rehabilitation services to a handicapped person who intends to become a priest would not be in conflict with any State or Federal constitutional or statutory provisions regarding the separation of Church and State.

JUNE 1, 1962.

MR. FRANCIS A. HARDING, *Commissioner of Rehabilitation.*

DEAR SIR: — You have requested an opinion as to whether or not your commission may act upon a request for vocational rehabilitation services from a Massachusetts resident whose assumed job objective is in the Catholic priesthood. Specifically you ask whether "any general provisions of the law regarding the separation of Church and State" would prevent the rendering of such services.

The powers and duties of your commission are set forth in G. L. c. 6, §§ 74–84. Section 78 provides in part:

"The commission shall provide vocational rehabilitation services directly or through public or private rehabilitation facilities to any handicapped person (1) who is a resident of the State at the time of filing his application therefor and whose vocational rehabilitation the commission, after full investigation, determines can be satisfactorily fulfilled. . . ."

Section 77 contains the following pertinent definitions:

" 'Disabled person', a person who has a physical or mental condition which materially limits, contributes to limiting, or, if not corrected, will probably result in limiting his activities or functioning;

" 'Handicapped person', a disabled person whose disability constitutes

a substantial handicap to employment but which is of such a nature that vocational rehabilitation services may reasonably be expected to render him fit to engage in a remunerative occupation;

" 'Vocational rehabilitation services,' any goods and services necessary to render a handicapped person fit to engage in a remunerative occupation or in the occupation of homemaker . . ."

The occupation of a priest (or minister or rabbi, for that matter) is recognized by the State and Federal governments as a useful, honorable and remunerative one. General Laws, c. 3, § 14, provides for the establishment of a salary for the chaplain of the Senate and the chaplain of the House of Representatives; G. L. c. 125, § 13, provides for the employment of chaplains in correctional institutions; G. L. c. 120, § 3, provides for the employment of chaplains in the Youth Service Division. It is well known that chaplains serve in all the military services and in the Congress of the United States.

Your commission is empowered to administer a general program to aid handicapped persons. The rendering of such services is similar to the provision of free transportation and other aids to students attending both public and parochial schools which has been held not to offend either the State or Federal Constitutions.

Everson v. *Board of Education*, 330 U. S. 1.
Attorney General's Report, 1936, p. 40.
Attorney General's Report, 1943, p. 74.
Attorney General's Report, 1951, p. 38.

In all such cases the aid is given or the services rendered to individuals and not to religious institutions.

Therefore, it is my opinion that there is no conflict between any State or Federal constitutional or statutory provisions regarding the separation of Church and State and your commission's extending its services to an otherwise eligible person who intends to become a priest.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General*,

By Lawrence E. Cooke,
Assistant Attorney General.

Rental contracts by local airport commissions are not subject to approval by the Massachusetts Aeronautics Commission but construction contracts are and latter may be disapproved if unfair, discriminatory or illegal provisions are included.

June 4, 1962.

Mr. Crocker Snow, *Director, Massachusetts Aeronautics Commission.*

Dear Sir: — In your recent letter you call my attention to the provisions of G. L. c. 90, §§ 51H and 51K, and G. L. c. 6, § 59. You state that a prospective tenant of the Turners Falls Airport has complained that his

company is being discriminated against by the Montague Airport Commission in the terms of a proposed lease for hangar construction and operating right at the airport. You also state that a tenant of the Beverly Airport has charged that his company, in lease renewal negotiations with the Beverly Airport Commission, has been offered the alternative of either accepting unreasonable charges or not having his lease renewed. In the light of these circumstances you pose the following question:

"If in our judgment either one or both of these complaints is justified, what action, if any, can we take to have the unreasonableness or discrimination corrected?"

General Laws c. 6, § 59, deals with the powers and duties of the director. It provides that:

"The director shall be the executive officer of the commission and, subject to its supervision and control, shall administer the provisions of sections thirty-five to fifty-two, inclusive, of chapter ninety and the rules, regulations and orders issued and promulgated thereunder, and all other laws of the Commonwealth which grant powers to or impose duties upon the commission. He shall attend all meetings of the commission but shall have no vote."

General Laws c. 90, § 51H, deals with the subject of charges or rentals for use of properties, facilities, installations and terms and conditions of contracts. It provides specifically that:

"*An airport commission* shall determine the charges or rentals for the use of any properties, facilities, installations, landing fees, concessions, uses and services and *shall determine* the terms and conditions under which contracts may be executed by the commission on behalf of such city or the town. . . ." (Emphasis supplied.)

General Laws, c. 90, § 51K, deals with the subjects of the receipt of Federal funds by the Massachusetts Aeronautics Commission, bids for contract for establishment, construction, enlargement of airports, and expenditures in anticipation of Federal or State funds. It provides specifically in the second paragraph thereof the following:

"Every such airport commission may invite bids for any contract involving the acquisition, establishment, construction, enlargement, protection, equipment, maintenance or operation of an airport, the site for which has been approved as provided by section thirty-nine B, and shall submit every such proposed contract to said Massachusetts aeronautics commission for approval. After approval has been given, said airport commission may award such contracts; provided, that the liability incurred shall not exceed the funds available therefor, including the appropriation voted and the amount of any gift or bequest, together with the amount or amounts stated in any existing agreements for the allotment or grant of funds by the Federal government or Commonwealth, or both."

A reading of §§ 59, 51H and 51K justifies several conclusions. The director shall be the executive officer of the commission and, subject to its control, *shall administer* the provisions of §§ *thirty-five to fifty-two, inclusive, of c. ninety* and the rules, regulations and orders issued and promulgated thereunder, and all other laws of the Commonwealth which grant powers to or impose duties upon the commission. The director is vested with the

power to administer the provisions of §§ 35 to 52, inclusive, two of which are §§ 51H and 51K.

Section 51H provides that *an airport commission* shall determine the charges or rentals for the use of any properties and shall determine the terms and conditions under which contracts may be executed by the commission.

The second paragraph of § 51K provides that invitations for bids for certain contracts must be submitted to the Aeronautics Commission for approval before the contract is awarded.

Without attempting to adjudicate the two specific matters you refer to, in my opinion, under the terms of § 59 the director shall administer the provisions of §§ 51H and 51K as they are written. Section 51H provides that an *airport commission* shall determine the charges or rentals of properties and shall determine the terms and conditions under which contracts therein referred to may be executed by the commission. I see no reference to the director nor the Massachusetts Aeronautics Commission in § 51H.

The second paragraph of § 51K provides that as to any contracts therein referred to the same must be submitted to the Massachusetts Aeronautics Commission for approval before they are awarded. As to such, the Massachusetts Aeronautics Commission may reasonably reject or withhold its approval of any contract referred to in § 51K when it determines that unfair, discriminatory or illegal provisions appear in the contracts submitted to it for approval. It may be noticed that there is no provision in § 51H requiring the approval by the Massachusetts Aeronautics Commission of any of the activities therein referred to.

It is clear, in my opinion, that the rights and duties of the director are limited by the express provisions of §§ 51H and 51K. He is to see that they are administered *as they are written.* Except as indicated above, I have not attempted further to categorically answer your question, leaving it to further conferences between you and this office covering specific situations as they arise.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The $1,500,000 appropriated in the 1957 Capital Outlay Appropriation Act, for the Commonwealth's share of the cost of the work by Fall River, under St. 1957, c. 607, to remedy the pollution of the Quequechan River therein, is to be spent by the city subject to compliance with the conditions contained in § 2 of c. 607.

JUNE 4, 1962.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — In your letter of recent date relative to St. 1957, c. 607, providing for the elimination of pollution in the Quequechan River, you refer to the last paragraph of § 1 of said chapter. You also refer to Item 8260–74 of St. 1959, c. 604, § 2, and conclude your letter by requesting an opinion upon the two following queries:

"1. Should the department furnish to the city of Fall River the State's $1,500,000 to be spent by the city for the work authorized by c. 607 and under the conditions contained therein.

"2. If the answer to the above is in the negative does the department, as the contracting agency, under the authority and provisions of G. L. c. 91, § 11, have the authority to expend the $1,500,000 for the type of work authorized by c. 607 under its own direction and without the conditions imposed under § 2 of c. 607."

Acts of 1957, c. 607, is entitled, "AN ACT AUTHORIZING THE CITY OF FALL RIVER TO BORROW MONEY OUTSIDE THE DEBT LIMIT FOR THE PURPOSE OF REMEDYING THE POLLUTED CONDITION OF THE QUEQUECHAN RIVER IN THE CITY OF FALL RIVER" and contains an emergency preamble providing as follows:

"*Whereas,* The deferred operation of this act would tend to defeat its purpose, which is to provide without delay for the elimination of pollution in the Quequechan river in the city of Fall River, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public health, safety and convenience."

In general, c. 607 authorizes the city of Fall River to incur indebtedness in an amount not exceeding three million dollars, to acquire land or interests therein and structures necessary to remedy the presently polluted condition in the Quequechan River and for the construction of any project for said purpose and for the cost of surveys, plans and supervision.

The second paragraph of § 1 of c. 607 provides that:

"Said sum shall be expended in conjunction with any money allotted for the purpose by the Commonwealth under the provisions of chapter ninety-one of the General Laws, and any funds allotted for the purpose by the Federal government."

Section 2 of c. 607 contains various limitations, conditions and restrictions upon the disbursement of the funds authorized to be borrowed under § 1.

Section 3 of c. 607 provides that the act shall take full effect upon its acceptance by vote of the city council with the approval of the mayor, but

not otherwise. I assume that, although it is not stated, c. 607 has been properly accepted and is now in full force and effect.

Chapter 604 of St. 1959 entitled "AN ACT TO PROVIDE FOR A SPECIAL CAPITAL OUTLAY PROGRAM FOR THE COMMONWEALTH," containing an emergency preamble, under the title of "Service of the Department of Public Works, Division of Waterways," provides in Item 8260–74 of § 2 "For the Commonwealth's share of the cost of work authorized by chapter six hundred and seven of the acts of nineteen hundred and fifty-seven — $1,500,000.00."

It may be borne in mind that under Item 8260–61, $5,500,000 is appropriated for, among other things, improvement, development and maintenance of rivers, harbors, tidewaters, shores and great ponds within the Commonwealth ". . . as authorized by section eleven of chapter ninety-one of the General Laws, to be used in conjunction with any Federal funds made available for the purpose. . . ."

It should be stated that both chapters 607 and 604 contain emergency preambles and should be construed together to accomplish the purpose of remedying the polluted dangerous condition of the Quequechan River in Fall River set forth in c. 607. While it is true that the second paragraph of § 1 of c. 607 provides that the sum authorized to be borrowed under the first paragraph of § 1 is to ". . . be expended in conjunction with any money allotted for the purpose by the Commonwealth under the provisions of chapter ninety-one of the General Laws. . . ." In my opinion Item 8260–74 of St. 1959, c. 604, § 2, enacted more than two years after c. 607, was intended by the General Court to be an appropriation to effectuate the purposes of the second paragraph of § 1 of c. 607. It so states that Item 8260–74 is "For the Commonwealth's share of the cost of work authorized by chapter six hundred and seven of the acts of nineteen hundred and fifty-seven . . . $1,500,000.00." That this appropriation was not included in Item 8260–61 of $5,500,000 for general c. 91 purposes does not alter the conclusion to which I come. It does, however, emphasize and recognize the great need of segregating a million and a half dollars for the purpose of eliminating a serious health menace in the city of Fall River.

In my opinion, the answer to your first question is in the affirmative, every safeguard being employed by your department to insure the strict compliance by all concerned of the provisions of c. 607. In the light of the foregoing, no answer to your second question is necessary.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By WILLIAM D. QUIGLEY,
Assistant Attorney General.

The Board of Registration in Veterinary Medicine has no authority to make rules and regulations for the taking by registered veterinarians of National Board examinations under the supervision of the Chairman or Secretary and to set the fee therefor.

JUNE 13, 1962.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — In your letter of recent date relative to the Board of Registration in Veterinary Medicine you state that your board has received inquiries from veterinarians registered in Massachusetts in regard to the National Board examinations because at the present time seventy-five percent of the States are using the National Boards for their examinations.

You state that permitting veterinarians only to take the National Board portion of the examinations would then make these veterinarians eligible for reciprocity with other States who give the National Board examinations. You further state that this board pays a fee of $12.50 per applicant to the National Board for this service. In the light of these facts you state:

"The Veterinary board wishes to know whether they may make rules and regulations under c. 112, § 54, whereby:

"1. Any *veterinarian already registered* to practice veterinary medicine in Massachusetts may be permitted to take the National Board examination *only*, at an examination given under the supervision of the chairman or secretary of the board.

"2. May the Board set the fee for this examination?"

General Laws c. 112, §§ 54 to 60, relate to the examinations and registration of veterinarians by the Board of Registration in Veterinary Medicine. Section 54 provides that:

"The board of registration in veterinary medicine, in sections fifty-five to sixty, inclusive, called the board, may make by-laws and rules consistent with law necessary to carry out the provisions of said sections. . . ."

Section 55 provides in substance for the filing of applications for registration as veterinarians. It also provides in some detail for given qualifications of the applicant which if being present the applicant shall ". . . be examined, and, if found qualified by the board, shall be registered as a veterinarian and shall receive a certificate thereof, signed by the chairman and secretary. . . ." Section 56 in substance provides that examinations shall be in part in writing, shall be in English, and of a scientific and practical character. Moreover, the examination shall include the subjects of anatomy, surgery, physiology, animal parasites, obstetrics, pathology, bacteriology, diagnosis and practice, therapeutics, pharmacology, veterinary dentistry and other subjects thought proper *by the Board* to test the applicants' fitness to practice veterinary medicine.

I am unaware of any provision in §§ 54 to 60, inclusive, relating to reciprocal registration. That is, registration in other States of veterinarians registered in this Commonwealth and the registration in this State of veterinarians registered elsewhere. This omission takes on added significance when it is borne in mind that many, if not most, of the Boards of Registration are specifically authorized to issue reciprocal registrations.

(G. L. c. 112, § 2, physicians; G. L. c. 112, § 16, chiropodists; G. L. c. 112, § 23D, physical therapists; G. L. c. 112, § 24, pharmacists; G. L. c. 112, § 48, dentists; G. L. c. 112, § 68, optometrists; G. L. c. 112, § 76, nurses and practical nurses; G. L. c. 112, § 87Z, hairdressers; G. L. c. 112, § 87WW, real estate brokers and salesmen; G. L. c. 112, § 87OOO, electrologists.)

In the light of the foregoing, I am constrained to rule that the Board of Registration in Veterinary Medicine, under G. L. c. 112, §§ 54 to 60, inclusive, as presently written, is given no power to engage in reciprocal registration. Naturally, the board cannot extend its own jurisdiction by its own rules and regulations. The fact that, as stated to me in my conference with you last week, attempts to have corrective legislation passed dealing with the subject matter we are discussing have failed, leads me to the conclusion that the omission I have referred to is not by inadvertence. In view of what I have said, I am compelled to answer your questions in the negative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Massachusetts Port Authority is to reimburse the Commonwealth for the proportionate part of the retirement allowances paid by the Commonwealth to employees of the Authority attributable to their total periods of employment by the Mystic River Bridge Authority.

JUNE 21, 1962.

HON. JOHN T. DRISCOLL, *Chairman, State Board of Retirement.*

DEAR SIR: — In your recent letter you make inquiry relative to reimbursement to the Commonwealth by the Massachusetts Port Authority of the latter's share of retirement allowances to the employees of the Authority, formerly employees of the Mystic River Bridge Authority.

After referring to St. 1956, c. 465, § 22, you state that the employees of the Mystic River Bridge Authority were covered under the Federal Old Age and Survivors' Insurance laws from January 1, 1952, until February 16, 1959, on which latter date you state the Massachusetts Port Authority assumed control of the Mystic River Bridge. You then state that it seems that the statute is quite clear that the Massachusetts Port Authority is financially responsible to the Commonwealth for any retirement allowances based on service between January 1, 1952, and February 16, 1959. You request an opinion on this question.

You then refer to St. 1960, c. 525, and state that the question has been raised as to whether or not the Massachusetts Port Authority is financially responsible to the Commonwealth for that portion of a retirement allow-

ance based on creditable service allowable under the provisions of St. 1960, c. 525, or whether or not the responsibility of the Port Authority covers only the creditable service allowed in c. 465.

As you are aware, St. 1956, c. 465, created the Massachusetts Port Authority and authorized its acquisition of various properties, including the Mystic River Bridge. Section 22 of that chapter deals with the subject of the transfer to the Port Authority of employees of the properties acquired by it, including the Mystic River Bridge Authority. The third paragraph, as you are also aware, provides that:

"Every employee who immediately prior to being transferred to the Authority by this section is a member of the State retirement system . . . shall continue to be a member thereof and subject to the laws applicable thereto. All other employees of the Authority shall be required to become members of the State retirement system in the same manner and subject to the same laws, rules and regulations as persons entering the employ of the Commonwealth. *EMPLOYEES OF THE MYSTIC RIVER BRIDGE AUTHORITY UPON BECOMING MEMBERS OF THE STATE RETIREMENT SYSTEM SHALL BE ALLOWED AS CREDITABLE* PRIOR *SERVICE THE PERIOD OF THEIR EMPLOYMENT BY THE MYSTIC RIVER BRIDGE AUTHORITY UNDER FEDERAL OLD AGE AND SURVIVORS INSURANCE LAWS.* The Authority shall deduct from the wages of its employees and pay over to the State retirement board . . . such sums as the Commonwealth . . . would deduct and pay over if such person were an employee of the Commonwealth. . . ." (Emphasis supplied.)

The fourth paragraph provides that:

"THE AUTHORITY SHALL REIMBURSE THE COMMONWEALTH . . . FOR ITS PROPORTIONATE SHARE OF ANY AMOUNTS EXPENDED BY THE COMMONWEALTH . . . UNDER THE PROVISIONS OF CHAPTER THIRTY-TWO OF THE GENERAL LAWS FOR RETIREMENT ALLOWANCES TO OR ON ACCOUNT OF ITS EMPLOYEES." (Emphasis supplied.)

Speaking generally, the rights of employees of the Commonwealth are set forth in G. L. c. 32. By the terms of St. 1958, c. 599, various provisions of c. 465 were amended as therein set forth. The fourth paragraph of § 22 of St. 1956, c. 465, relative to reimbursement of the Commonwealth by the Authority for its proportionate share of amounts expended by the Commonwealth for retirement allowances to or on account of the employees of the Authority was retained intact.

On July 6, 1960, His Excellency the Governor approved c. 515 of the acts of that year. This act is entitled, "AN ACT PROVIDING THAT CERTAIN EMPLOYEES OF THE MASSACHUSETTS PORT AUTHORITY BE ALLOWED TO COUNT AS CREDITABLE SERVICE THE PERIOD OF THEIR EMPLOYMENT BY THE MYSTIC RIVER BRIDGE AUTHORITY FOR PURPOSES OF RETIREMENT." It has an emergency preamble reading as follows:

"Whereas, The deferred operation of this act would tend to defeat its purpose, which is to provide forthwith that certain employees of the Massachusetts Port Authority be allowed creditable service under the retirement

law for the total period of their prior employment by the Mystic River Bridge Authority, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience."

Section 1 of c. 525 amends the third paragraph of § 22 of c. 465 by striking out the third sentence and inserting in place thereof the following sentence:

"Employees of the Mystic River Bridge Authority upon becoming members of the State retirement system shall be allowed as creditable *prior* service the *total* period of their prior employment by the said Authority." (Emphasis supplied.)

Section 2 of c. 525 provides that no person who was an employee of the Mystic River Bridge Authority on the date of the acquisition of said Authority by the Massachusetts Port Authority, shall be excluded from membership in the State Employees Retirement System if he was under the maximum age for his group on said date.

A reading of the provisions of St. 1956, c. 465, § 22, and St. 1960, c. 525, so far as they relate to the subject matter you inquire about, leads me to the conclusion that the former employees of the Mystic River Bridge Authority now in the employ of the Massachusetts Port Authority who are members of the State Employees' Retirement System are entitled to be allowed as creditable prior service the total period of their employment by the Mystic River Bridge Authority prior to February 16, 1959. According to the express provisions of § 22 of c. 465:

"The Authority" (meaning the Massachusetts Port Authority) "shall reimburse the Commonwealth . . . for its proportionate share of any amounts expended by the Commonwealth . . . for retirement allowances to or on account of its employees. . . ."

This provision seems to me to be clear and unambiguous under the circumstances and should be complied with.

The foregoing subject matter was referred to in *Opinion of the Justices*, 334 Mass. 721, where the Honorable Senate propounded a number of questions relative to the constitutionality of the Massachusetts Port Authority legislation. The twentieth question read as follows:

"May the Commonwealth constitutionally undertake to pay retirement allowances of retired employees of the authority subject to being reimbursed by the Authority as provided in Section 22 of the bill?"

The Supreme Court answered the question in the affirmative saying:

"Since the Authority would be a public corporation, we see no reason why the Commonwealth cannot undertake these payments which would be for a public purpose and would be reimbursed to the Commonwealth."

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

Changes in design and new designs required by the Metropolitan District Commission under a contract for highway construction design and to be paid for under the contract as additional services on a cost-plus basis.

JUNE 21, 1962.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — In your recent letter you requested an opinion as to whether or not your department may enter into an agreement for the inspection of materials either by a process of selective bidding, so called, or by selection without bidding and not in violation of G. L. c. 29, § 8A.

Chapter 29, § 8A, provides in part as follows:

"No officer having charge of any office, department or undertaking which receives a periodic appropriation from the Commonwealth shall award any contract for the construction, reconstruction, alteration, repair or development at public expense of any building, road, bridge or other physical property if the amount involved therein is one thousand dollars or over, unless a notice inviting proposals therefor shall have been posted, not less than one week prior to the time specified in such notice for the opening of said proposals, in a conspicuous place on or near the premises of such officer, and shall have remained so posted until the time so specified, and, if the amount involved therein is in excess of five thousand dollars, unless such a notice shall also have been published at least once not less than two weeks prior to the time so specified . . ."

You will note that the provisions of this section relate to contracts for work for the "*construction, reconstruction, alteration, repair or development* at public expense of any building, road, bridge or other physical property. . . ." (Emphasis supplied.) Your letter would indicate to me that the work of the contractors in this particular instance would only be the rendering of personal services and therefore would not fall within the provisions of § 8A.

You therefore could award a contract of this nature by the process of selective bidding or by the selection without bidding.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOHN J. GRIGALUS,
Assistant Attorney General.

The Competitive Bidding Law is not applicable to a contract by the State Department of Public Works for the inspection of materials.

JUNE 25, 1962.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have asked the opinion of this office with regard to an interpretation of a contract entered into between the Metropolitan District Commission and a consultant firm, Highway Engineers, Inc.

You state that in connection with the project (a proposed reconstruction and widening of the Arborway-Riverway-Jamaicaway, City of Boston), the consultant had prepared a report setting out three alternate schemes for handling the problem. The Metropolitan District Commission, by vote dated September 16, 1959, voted to proceed under scheme three. On February 24, 1960, the commission and the consultant entered into the agreement you now inquire about.

According to your letter the consultant had proceeded substantially with the design of the facility in accordance with the vote and orders of the commission.

In the latter part of 1960, due to objections and conferences between the commission and the city of Boston and the town of Brookline, the commission, in deference to the objections of the town of Brookline, ordered a change in plans so far as they relate to outbound traffic on the Brookline side of Leverett and Jamaica Ponds.

You have asked whether or not the new designs and design changes which will be required in connection with the scheme recently approved by the town of Brookline can be paid for in accordance with the provision on page 10 of the contract relating to "termination or discontinuance of contract" or on page 3 under "Changes and Revisions."

This office is of the opinion that neither reference is controlling but that in view of the facts as stated in your letter the commission may proceed under paragraph 6, subdivision B, page 3, which reads as follows:

"If, during the performance of the contract, other or additional services are required, or after plans have been accepted by the COMMISSION, changes are required other than those necessary to adapt the plans to conditions encountered during construction, the COMMISSION may order the CONSULTANT, in writing, to perform such services and the CONSULTANT shall receive an added compensation for such additional services or changes in design of actual out-of-pocket expense and allowance for principal's and employees' time, plus one hundred per cent (100%).

"In connection with such additional work or change in plans, the CONSULTANT agrees to maintain a complete accurate record, in form satisfactory to the COMMISSION, of all time devoted directly to same by the

CONSULTANT and his employees, and the COMMONWEALTH reserves the right to audit the records of the CONSULTANT relating thereto, but such services as are rendered hereunder shall be subject in all other respects to the terms of this Contract."

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By WILLIAM D. QUIGLEY,
Assistant Attorney General.

Determinations of fact, policy and discretion in matters before an administrative board are for the board, and an opinion of the Attorney General as to whether the Alcoholic Beverages Control Board should have exercised its discretion, conformably to its rules, in granting a rehearing to an appellant would not be rendered.

JUNE 26, 1962.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You have advised me that your commission has before it a matter for rehearing which is before you on *Appeal* from the action of the Licensing Board of the city of Boston which refused to grant permission for transfer of location of a license.

It is my understanding that the commission, after the appeal hearing, decided in favor of approving the local board action in not granting the transfer.

A request for rehearing has been made under the provisions of Commission Regulation 49 within the current license year, which request was granted and the hearing reheld.

Under the provisions of G. L. c. 138, § 24, the commission, with the approval of the Governor and Council, makes regulations not inconsistent with the provisions of c. 138 for clarifying, carrying out, enforcing and preventing violation of any and all of the provisions of G. L. c. 138, as amended.

In accordance with the provisions of § 24, the commission, with the approval of the Governor and Council, has adopted certain regulations, among them Regulation 49, which reads as follows:

"When, after hearing and consideration, an issue upon appeal has been decided there shall be no rehearing of the same issue within the current

license year, except that upon motion by the aggrieved party accompanied by his affidavit, filed within seven days from the time said party received notice of said decision from the commission, said party (1) shall show prima facie that substantial justice has not been done, or (2) shall set forth newly discovered evidence, stating in such affidavit sufficient reasons why such evidence could not have been presented at the hearing. Such evidence set forth in said affidavit shall be of such a nature as to form a basis, in the opinion of the commission, for reversal of its judgment or for granting a rehearing. Upon receipt of said motion and affidavit, the commission shall, in its discretion, determine whether or not the motion shall be allowed, and shall notify the aggrieved party of its decision."

It is clear from a reading of this regulation that a rehearing by your commission under the Liquor Control Act may be had only on the following terms:

(1) If the aggrieved person shall show prima facie that substantial justice has not been done, or

(2) Shall set forth newly discovered evidence, stating in such affidavit sufficient reasons why such evidence could not have been presented at the hearing. Such evidence set forth in said affidavit shall be of such a nature as to form a basis, in the opinion of the commission, for reversal of its judgment or for granting a rehearing. Upon receipt of said motion and affidavit, the commission shall, *in its discretion*, determine whether or not the motion shall be allowed, and shall notify the aggrieved party of its decision.

It is not the function of the Attorney General to pass upon questions of fact, policy or discretion.

All determinations of fact, policy and discretion involved in matters coming before an administrative board such as the Alcoholic Beverages Control Commission are properly left to the hearing tribunal which because of its experience, technical competence and knowledge of the subject matter, together with the authority conferred upon it by law, is better able to determine questions of fact, administrative policy and discretion brought before it.

Whether an application for a rehearing of a matter decided by the commission should be granted or denied is entirely discretionary with the commission. The discretion to be exercised is that of the commission and not that of the Attorney General, or any other official or body.

It appears that the commission has already exercised its discretion in favor of the applicant by granting the application for a rehearing, and has in fact reheard the matter.

In effect, therefore, the request of the commission is for an expression of opinion by the Attorney General as to whether if he were making the decision the commission did on the application for a rehearing he would have made the same decision. However, as stated above, the question was

one to be determined by the board in the exercise of a sound discretion and it is not the function of the Attorney General to pass upon matters involving the exercise of its discretion by the commission, whether his opinion is requested before or after the tribunal exercises its discretion.

It should be noted for your information, however, that it is established law that a decision by an administrative board in the exercise of its discretion is given great weight, implies the findings of fact necessary to support it, and that only a showing of clearest abuse of discretion justifies any interference with a decision of an administrative board granting a rehearing.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

INDEX TO OPINIONS

PAGE